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PUNITIVE DAMAGES

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ANNO ACCADEMICO 2017/2018

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INTRODUCTION

The aim of this study is to increase the understanding of the punitive damages remedy as such, in order to find out whether this particular civil remedy has a future in the European Union.

Punitive damages are recognized by a sum of money awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, aiming to punish and deter the tortfeasor.

Precisely because of the punitory and deterrent functions, punitive damages have been, and still are, subject to the critics of legal scholars.

This negative approach derives mainly by several obstacles that are intrinsic to the civil law traditions, such as the compensatory function of tort law and the strict division between private law and criminal law.

In fact, for many years several European civil law countries have established the exclusive compensatory function of tort law, thus, considering the aims of punishment and deterrence as proper of criminal law.

In this respect, at the European level, whereas the Draft Common Frame of Reference and the Principles of European Tort Law provide that tort law pursues also other functions, such as the preventive of the harm, they also expressly reject the punitive aim, by asserting that punishment belongs to the realm of criminal law.

From this perspective, punitive damages should be considered as criminal sanctions and cannot be awarded without applying the appropriate procedural safeguards underlying the criminal proceeding.

In addition, the punitive damages doctrine is controversial and criticized also in the United States and in England, where their history is traced back.

This debate has, on one hand, led common law countries to regulate this civil remedy, by limiting their use and introducing restrictions to their amount, and, on the other hand, has pushed civil law countries to change approach in light of the developments occurred, particularly by abandoning the traditional monofunctional nature of tort law.

Therefore, this work of research will take a closer look into these progresses, showing that the rise of a more positive approach, not only by legal scholars, but also by several national Supreme Courts, which do

not consider anymore punitive damages incompatible with their public order, can be considered as a symptom of a possible legal transplant.

Furthermore, despite the more restricted approach of the European legislator, the willingness of the CJEU to welcome the punitive damages remedy in the European Union tradition and the European Commission's attempt to provide for punitive damages in order to fight competition law infringements are another signal of a future introduction of the Anglo-Saxon remedy in continental Europe.

CHAPTER I: Punitive Damages in Italy

TABLE OF CONTENTS: 1. The origins of punitive damages. – 2. The debate in Italy. – 2 (a) First objection. – 2 (b) Second objection. – 2 (c) Third objection. – 2 (d) Fourth objection. – 3. Decisions of the Italian Supreme Court. – 3.1 Corte di Cassazione 17th January 2007, n. 1183. – 3.1 (a) Does Italian tort law pursue only a compensatory function? – 3.1 (b) Disproportion between damages awarded and harm actually suffered. – 3.1 (c) Irrelevance of wrongdoer's conduct and wealth. – 3.2 *Corte di Cassazione* 8th February 2012, n. 1781. – 3.3 *Corte di Cassazione* 15th April 2015, n. 7613. – 3.4 *Corte di Cassazione* 5th July 2017, n. 16601. – 4. Future prospects.

1. The origins of punitive damages

The precursor of modern punitive damages was the statutory remedy of multiple awards, a practice that, like punitive damages, provided for awards in excess of actual harm¹.

In modern tort law, compensation is the dominant remedy, but fault still has a prominent place in many forms of wrongdoing.

Punitive, or exemplary, damages are an exception to the most fundamental principle in the modern law of remedies that tort damages should restore the victim to the pre-tort condition (*restitution in integrum*).

Punitive damages are used as a supplementary sanction in exceptional cases where compensatory damages do not provide sufficient level of deterrence and retribution. Known by various names, including penal, retributory, or vindictive damages, punitive damages are described as «money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights²».

¹ L.L. SCHLUETER-K.R. REDDEN, *Punitive Damages*, New York, 2000, p. 1 f.

² See D.G. OWEN, *A Punitive Damages Overview: Functions, Problems and Reform*, in 39 *Vill. L. Rev.*, 1994, pp. 363-383, which describes punitive damages as «straddling the civil and the criminal law, being a form of “quasi-criminal” penalty: they are

Punitive damages are awarded for three main reasons: (1) «to punish the defendant and provide retribution», (2) «to act as a deterrent to the defendant and others minded to behave in a similar way», and (3) «to demonstrate the court's disapproval of such conduct»³.

This rationale of deterrence becomes a crying need in cases where the law systematically underestimates damages or where the wrongdoer counts profit from a violation that the law does not recognize in purely compensatory terms⁴.

One of the earliest systems of law to utilize civil punitive damages was the code of Hammurabi in 2000 B.C.⁵ Punitive forms of damages also

“awarded” as “damages” to a plaintiff against a defendant in a private lawsuit; yet their purpose in most jurisdictions is explicitly held to be non-compensatory and in the nature of a penal fine. Because the gravamen of such damages is considered civil, the procedural safeguards of the criminal law (such as the beyond-a-reasonable-doubt burden of proof and prohibitions against double jeopardy, excessive fines and compulsory self-incrimination) have generally been held not to apply. This strange mixture of criminal and civil law objectives and effects – creating a form of penal remedy inhabiting the civil-law domain – is perhaps the principal source of the widespread controversy that has always surrounded the allowance of punitive damages awards».

³ See H. LUNTZ, *Assessment of Damages for Personal Injury and Death*, 2002, p. 71 f.; D.D. ELLIS JR, *Fairness and Efficiency in the Law of Punitive Damages*, in 56 *S. Cal. Law Rev* 1, 1982, p. 3, according to which at least six objectives have been identified for imposing punitive damages: (1) punishing the wrongdoer; (2) deterring the wrongdoer and others from committing similar offenses; (3) preserving the peace; (4) inducing private law enforcement; (5) compensating victims for an otherwise non compensable loss; and (6) paying the plaintiff's attorneys' fees.

⁴ See G. GEORGIADIS, *Punitive Damages in Europe and the USA: Doctrinal Differences and Practical Convergence*, in 58 *RHDI*, 2005, p. 147, according to which « [...] punitive damages serve to punish and deter the tortfeasor. They are action-oriented, tortfeasor-oriented, and mostly prospective. On the contrary compensatory damages serve to put the victim in the position it would have been in had the wrongful act not occurred. They are loss-oriented, victim-oriented, and retrospective».

⁵ In the Code of Hammurabi, punitive damages, in the sense of multiple damages, were payable for offences, such as stealing cattle (from a temple, thirty-fold; from a freeman, ten-fold), a merchant cheating his agent (six times the amount), or a common carrier failing to deliver goods (five-fold their value). See G. DRIVER-J. MILES, *The Babylonian Laws*, Oxford, 2007, pp. 500-501; see also L.L. SCHLUETER-K.R. REDDEN, *op.cit.*

appeared in the Hittite law in 1400 B.C. and in the Hindu Code of Manu in 200 B.C.⁶

Even Roman law, from its very beginnings, recognized that a wrongdoer might be liable to make payments to the victim for an amount beyond the actual harm suffered⁷. The Twelve Tables, dating from 450 B.C., provided several examples of multiple damages, in the form of fixed money payments, such as where a party failed to carry out a promise, or where a party was a victim of usury.⁸

Roman law recognized three great torts: (1) *furtum*, civil theft, relating to the wrongful distribution of wealth; (2) *damnum iniuria*, "wrongful waste," directed against the wrongful waste of wealth; and (3) *iniuria*, a wrong-doing, which protected personality or personhood. Each allowed for multiple damages in the delictual action⁹.

⁶ Even the Bible contains several examples of multiple damages remedies. E.g. Exodus 22:1: «if a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep»; Exodus 22:9 «for all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challenge to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour».

⁷ See M. RUSTAD-T. KOENIG, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, in *The American University Law Review*, 1993, pp. 1285-1286, according to which «the early Romans apparently employed multiple damages to mediate social relations between patricians and plebeians and to punish those who injured or killed slaves».

⁸ H. F. JOLOWICZ, *The Assessment of Penalties in Primitive Law*, in *Cambridge Legal Essays Written in Honor of and Presented to Doctor Bond, Professor Buckland and Professor Kenny*, 1926, pp. 203-216, according to which «the penalty is made to fit, not the amount of damage inflicted by the tort, but the nature of the tort itself. In other words, the principle of appropriateness, not [...] reparation, is the guiding one». This multiple restitution, Jolowicz observes, is «a strong argument for the preponderance of the idea of fittingness over that of reparation in fixing the penalties».

⁹ This delictual action was penal and commonly resulted in the payment of more than compensation. In terms of civil theft, *furtum nec manifestum* (a thief by night or "non-manifest theft") involved double payment, while a manifest theft or *furtum manifestum*, by day, involved a higher fourfold money payment. The victim of a theft could demand to make a search with witnesses of any premises on which he thought the goods were hidden. If the search was refused, he could exact a fourfold penalty from the occupier. If the search was allowed, and the goods were found, the occupier of the premises was liable to a threefold penalty even if he knew man who left the goods on the premises,

Moreover, the Code of Justinian provided for multiple damages against the defaulting debtor, too¹⁰.

However, even if already in XIII century many statutes¹¹ provided for awards of punitive damages and there were cases in which damages exceeded those effectively suffered, the origin of punitive damages is traced back to the English cases of *Wilkes v. Wood*¹² and *Huckle v. Money* in 1763 that led to the first explicit articulation of the legal principle of exemplary damages.

Wilkes v. Wood concerned a search under a general warrant of arrest of a publishing house which had distributed a pamphlet, the “North Briton”¹³, defamatory towards the King. George III had proceeded,

but only if he did so to avoid detection. In terms of *damnum iniuria*, this was dealt with in the *Digest* 9.2 on the *Lex Aquilia*, a plebiscite promulgated by a Tribune of the Plebeian, Aquilius, between 286 and 195 B.C. A text from Gaius on the *Lex Aquilia* provides that «an action for double damages may be brought against a person who makes a denial». *Digest* 9.2.23 states: «where a slave is killed through malice (*dolo*), it is established that his owner can also bring suit under criminal process by the *Lex Cornelia* (*de iniuriis*), which punished three kinds of injury committed by violence, namely *pulsare* (beating), *verberare* (striking), and *domum introire* (forcible invasion of one's home)], and if he proceeds under the *Lex Aquilia*, his suit under the *Lex Cornelia* will not be barred. Further on, *Digest* 9.2.27 states: «if anyone castrates a boy slave, and thereby renders him more valuable, Vivianus says that the *Lex Aquilia* does not apply, but that an action can be brought for injury (*iniuriarum erit agendum*), either under the Edict of the aediles, or for fourfold damages (*in quadruplum*).

¹⁰ See P. GALLO, *Pene private e responsabilità civile*, Milan, 1996, p. 37 f.; W.W. BUCKLAND-A.B. MCNAIR, *Roman Law and Common Law*, Cambridge, 1936, pp. 344-48, according to which the function of multiple damages in Roman Law is completely different from that of punitive damages in common law.

¹¹ See F. BENATTI, *Correggere e punire. Dalla law of torts all'inadempimento del contratto*, Milan, 2008, p. 1 f., according to which the first example is the statute of Gloucester, 1278, 6, Edw. c. 5, which provided for treble damages for waste. Moreover, in cases of trespass against religious persons, a law of XIII century provided for double damages: «Trespassers against religious persons shall yield double damages», in *Synopsis of Westminster*, I, 3 Edw. 1, c. 1, Vol. 1, in *24 Statutes at Large*, 138 (Pickering Index 1761).

¹² *Wilkes v. Wood*, in *98 Eng. Rep.*, 1763, p. 489 f., in which the publisher asked for «large and exemplary damages» in his suit, because actual damages would not punish or deter this type of misconduct.

¹³ John Wilkes criticized the speech of George III at the Parliament, arguing that the King had given «the sanction of his sacred name to the most odious measures and to

through the Government, to provide for a general warrant of arrest, since the authors were unknown, and 48 persons were arrested, many of them unfairly. Thus, Mr. Wilkes brought an action in trespass against the official who executed the search and his counsel asked for «large and exemplary damages», since purely compensatory damages would not put a stop to such proceedings.

Lord Chief Justice Pratt instructed the jury that «damages are designed not only as a satisfaction to the injured person, but likewise as a punishment on the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself»¹⁴. With this decision the term punitive damages were introduced for the first time.

In *Huckle v. Money*¹⁵, government messengers arrested and confined the printer of the “North Briton” pamphlet for six hours on the orders of the Secretary of State. Although treated well, Huckle brought a suit alleging trespass, assault, and false imprisonment against the official executing the warrant. The jury awarded a verdict in favor of Huckle for £ 20 as compensatory damages and £ 300 as exemplary damages. Lord Chief Justice Pratt, the presiding judge, refused the application to set aside the jury verdict as excessive. Despite the fact that actual damages amounted to £20 at most, the Chief Justice stated: «the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 pounds damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light [...] I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no English- man would wish to

the most unjustifiable declarations from a throne even renowned for truth, honour and unsullied virtue».

¹⁴ In fact, the behavior of the Government was described by the Chief Justice as lacking any justification and «contrary to the fundamental principles of the constitution», *Wilkes*, cit., p. 499.

¹⁵ *Huckle v. Money*, in *95 Eng. Rep.*, 1763, p. 768.

live an hour; it was a most daring public attack made upon the liberty of the subject¹⁶».

An analogous reasoning is found in another following case, *Tullidge v. Wade*¹⁷, in which exemplary damages were awarded to the father of a pregnant girl. Chief Justice Wilmot, in his opinion, declared that «actions of this sort are brought for example's sake, and although the plaintiff's loss in this case may not really amount to the value of twenty shillings ye the jury has done right in giving liberal damages [...] if much greater damages had been given, we should have not been dissatisfied therewith».

It has been highlighted¹⁸ that at that time there was not yet a general theory concerning punitive damages and that only starting from the XIX century English courts began to expressly recognize the deterrent function of punitive damages as their *ratio*.

In order to explain the origins of punitive damages, two fundamental theories have been elaborated¹⁹.

The first theory links their origins to the role of the jury in the King's Court²⁰. The determination of the amount of damages was a prerogative

¹⁶ Further, Pratt stated: «perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great points of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate all over the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom [...]». See J. TALIADOROS, *The Roots of Punitive Damages at Common Law: A Longer History*, in 64 *Clev. St. L. Rev.*, 2016, pp 251-302.

¹⁷ *Tullidge v. Wade*, in 95 *Eng. Rep.*, 1769, p. 909.

¹⁸ See T.J. SULLIVAN, *Punitive Damages in the Law of Contract: the Reality and the Illusion of Legal Change*, in 61 *Minn. L. Rev.*, 1977, p. 207.

¹⁹ See F. BENATTI, *op cit.*; J.B. SALES-K.B. COLE JR, *Punitive Damages: a Relic that Has Outlived its Origins*, in 37 *Vand L. Rev.*, 1984, pp. 117-1120; L.L. SCHLUETER-K.R. REDDEN, *Punitive Damages, op.cit.*

²⁰ « [...] Common law courts [...] yet remained reluctant to disturb an excessive jury award when the defendant's conduct had been particularly outrageous. To justify this reluctance, courts developed a theory that the jury was permitted to award an amount in excess of actual damages, when the defendant's conduct had been motivated by malice or will», J. MALLOR-B. ROBERTS, *Punitive Damages toward a Principled Approach*, in 31 *Hastings L. J.*, 1980, p. 641.

of the jury, which carried out both detective and judiciary functions²¹. For those reasons, the Courts of Appeal refused to modify the verdicts of the jury, even when the damages extremely exceeded the compensatory ones. Thus, the power of the jury was discretionary and almost without limits²².

The second theory considers as the cause of punitive damages the necessity to compensate the plaintiff for offenses to his honor, thus for moral damages that initially were not considered compensable under common law²³.

Supposedly, those two theories together explain the origins of punitive damages, in combination with the assumption that punitive damages were the only remedy able to ensure a deterrent function, because they punish effectively serious offences and represent the society's contempt

²¹ Moreover, the members of the jury were selected for their knowledge of the parties and the case at stake. See J.B. SALES-K.B. COLE JR, cit, p. 1120, according to which «Early English common law juries consisted of local lawnspeap who knew more about facts than did the judges and under the reign of Henry II the Knights who acted as jurors also provided the only testimony of the trial».

²² See F. BENATTI, *op. cit.*, p. 5, according to which the only remedy for the abuse of the powers of the jury was the writ of attain, which provided a jury, composed of 24 members, to control the verdict of another jury and, if necessary, modify it by punishing the relative jury. The consequences of the writ of attain were particularly heavy: «become forever infamous; should forfeit their goods and the profits of their land; should themselves be imprisoned and their wives and children thrown out of doors, should have their house razed, their trees extirpated and their meadows ploughed».

²³ See T.B. COLBY, *Beyond the Multiple Punishment Problem: Punitive Damages and Punishment for Individual Private Wrong*, in 87 *Minn. L. Rev.*, 2003, p. 615, according to which «the plaintiff is a man of family, a baronet, an officer in the army, and a member of Parliament, all of them respectable situations, and which may render the value of the injury done to him greater». On the contrary, see A.J. SEBOK, *What did punitive damages do? Why misunderstanding the history of punitive damages matters today*, in 78 *Chicago-Kent L. Rev.*, 2003, p. 138, according to which «in footnote eleven of the decision, the court relied on a claim about the history of punitive damages that is at best misleading and at worst dangerous». So, the Author denies that the origin of punitive damages corresponds to the need to compensate moral damages.

towards outrageous behavior²⁴. Indeed, such function explains not only their origins, but also the reason why punitive damages were frequently awarded. In fact, within a decade of *Wilkes*, courts commonly awarded punitive damages in tort actions such as assault, false imprisonment, defamation, seduction, malicious prosecution, and trespass²⁵.

As the eighteenth century came to a close, exemplary damages were firmly entrenched in the Anglo-American tradition, and soon after its birth in England, the doctrine of punitive damages was exported to America.

2. The debate in Italy

Punitive damages²⁶ can be located within the discourse concerning private penalties, and, in particular, the relationship between damages and sanction.

²⁴ However, beyond the theories relating to the origin of punitive damages, the essential element of their admissibility was and is the existence of malice, oppression or gross fraud.

²⁵ See *Loudon v. Ryder*, in 2 *Q.B.*, 1953, p. 202 (assault); *Dumbell v. Roberts*, in 1 *All. E.R.*, 1944, p. 326 (false imprisonment); *Bull v. Vazquez*, in 1 *All E.R.*, 1947, p. 334 (defamation); *Tullidge v. Wade*, in 95 *Eng. Rep.*, 1769, p. 909 (seduction); *Leith v. Pope*, in 96 *Eng. Rep.*, 1779, p. 777 (malicious persecution); *Owen & Smith v. Reo Motors*, in 151 *L.T.R.*, 1934, p. 274 (trespass to goods).

²⁶ See G. PONZANELLI, *I danni punitivi*, in *NGCC*, II, 2008, pp. 25-33; See M. LA TORRE, *Un punto fermo sul problema dei danni punitivi*, in *Danno e responsabilità*, 4, 2017, pp. 422-423, according to which the term “punitive damages” refers to the Italian *risarcimento punitivo* and not to *danno punitivo*. In fact, the damage cannot be *per se* classified as “punitive” or “not punitive”. In fact, the issue is whether the damage can be qualified as «unjust», caused by an «intentional or negligent act», since in this case the author must compensate the damage (article 2043 of the Italian Civil Code). Thus, giving that the compensation aims to restore the prejudice, having to include «the loss suffered by the creditor, such as the loss of earnings» (article 1223 of the Italian Civil Code, which recalls article 2056, as regard tort), it follows that the damage (*danno*) cannot be “punitive”, but only its *risarcimento*, which occurs when it goes beyond mere compensation, thus, comprising also a punitive function.

In Italy, the debate started from the Meeting on Private Penalties organized by Busnelli and Scalfi in 1984²⁷.

The debate focused on the identification of the possible legitimacy of punitive civil sanctions, apart from the individual legal situations recognized, as well as on the determination of the limits of such sanctions, in particular with regard to the fundamental values of the Italian juridical system.

During the conference, the question was raised on whether punitive damages, proper of the Anglo-Saxon model, can have a certain kind of correspondence in the Italian juridical system²⁸.

Particularly interesting is the contribution of V. Zeno-Zencovich²⁹, who highlighted why punitive damages constitute a form of private penalty³⁰. Punitive damages are awarded when there is a behavior which appears extremely socially reprehensible (characterized by malice or by the particular negligence of the wrongdoer) and aim to afflict the offender, by dissuading him to repeat simile actions³¹. So, they are substantially independent from the amount of damage that has been caused, which

²⁷ F. BUSNELLI- G. SCALFI, *Le Pene Private*, 1985, which contains the report of the meeting held in 1984.

²⁸ Already the Report Zanardelli of the project of the criminal code of 1887, when defining a certain legal pecuniary remedy for the offence that should not be confused with damages, makes an express reference to punitive damages. However, that legal remedy was implemented in article 38 of the 1887 Italian Criminal Code, but then removed in the successive criminal code of 1930.

²⁹ V. ZENO-ZENCOVICH, *Pena Privata e Punitive Damages*, in *Le Pene Private*, F. BUSNELLI-G. SCALFI (eds.), 1985, pp. 375-393.

³⁰ See E. D'ALESSANDRO, *Pronunce americane di condanna al pagamento di punitive damages e problemi di riconoscimento in Italia*, in *Riv. Dir. Civ.*, 2007, p. 396, according to which punitive damages are judicial private penalties, since the punitive and deterrent nature do not raise from the text of the norm, but they emerge from the concrete application of the law by the judicial authority.

³¹ See M. TESCARO, *I punitive damages nordamericani: un modello per il diritto italiano?*, in *Contratto e impresa.*, II, 2012, pp. 599-649, according to which punitive damages pursues two principal aims: to punish the wrongdoer and create a deterrent effect. However, those two aims should be distinguished, since “to punish” means to cause a significant loss to the author of a reprehensible conduct, whilst “to create a deterrent effect” means to make the wrongdoer (special prevention) and all the other members of the society (general prevention) act in a way as to avoid the negative consequences that they might face.

instead, is compensated by compensatory damages. In the end, they do not seem to have the function to reintegrate the victim's subjective position.

Italian scholars have submitted many objections to the adoption of punitive damages in Italy. In particular, it has been argued (i) that punitive damages are substantially a criminal sanction³² (thus, they are extraneous to torts³³) and should be awarded exclusively by the criminal judge, by applying all the safeguards that characterize criminal proceedings, (ii) that the role of the jury in the United States constitutes an institutional obstacle to the reception of punitive damages, (iii) the "American rule", and, (iv) the economic analysis of law³⁴.

³² See L. DI BONA DE SARZANA, *Il Legal Transplant dei Danni Punitivi nel Diritto Italiano*, in *Liber Amicorum per Francesco Donato Busnelli*, Vol. I, 2008, p. 572, according to which the determination of the criminal nature of a norm depends on the type of sanction, by establishing, in particular, if the sanction falls within article 17, criminal code, characterized by the deprivation of the personal liberty. It is not possible to find this aim in punitive damages, thus, according to the Author, punitive damages do not qualify as criminal sanctions.

As regard the possibility that the plaintiff, by obtaining, together with the damages effectively suffered, the award of punitive damages, benefits from the offence, see P. SIRENA, *Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa*, in *Riv. Dir. Civ.*, IV, 2006, p. 532, according to which the attribution of the punitive damages, paid by the offender, to the State or other public entity would be in line with their functions. On the contrary, M. TESCARO, *op. cit.*, according to which if the sum paid by way of punitive damages was attributed to the State, there would be doubts about the necessity of a civil remedy, because the sanction would assume the form of a pecuniary penalty, proper of criminal law.

³³ See G. PONZANELLI, *I danni punitivi*, cit., p. 25, according to which in Italy there is a strong separation between tort law and criminal law, whilst U.S. tort law still retains a "strong criminal character".

³⁴ See G. PONZANELLI, *supra* note 33, pp. 26-27, according to which punitive damages are based on four fundamental principles, namely, (i) the strong dependence of tort law on criminal law and the absence of criminal safeguards, (ii) the role of the jury, which brings up the amount of damages, beyond a proper compensation and punishment and does not have to motivate, (iii) the American rule, according to which each party pays his own attorneys and, thus, U.S. judges consciously award (punitive) damages covering attorneys' fees to ensure an overall compensation and, (iv) the economic analysis, which imposes, in cases of under compensation, to transfer the uncompensated amounts to those who managed to obtain compensation. On the other hand, the Italian system is completely different. Tort law is nowadays completely

It is worth analyzing these issues separately.

a. First objection

As regard the first objection, it has been highlighted that, in common law, civil torts were born as criminal torts and, then, they gradually changed, even if they have maintained certain characteristics proper of their origin, particularly as regard the sanction imposed.

Thus, the absence of a rigid separation between U.S. tort and criminal law makes it acceptable for the U.S. system to administer punitive damages without the kind of safeguards that characterize criminal proceedings³⁵.

By contrast, the clear separation between Italian tort and criminal law would make it impractical to adopt punitive damages in domestic tort law, because it would be unacceptable to punish a wrongdoer without appropriate procedural protections³⁶.

However, even if U.S. and Italian scholars are aware of the issue of criminal procedural safeguards, it should not prevent the introduction of punitive damages in Italy, but it should suggest the introduction of more intensified safeguards.

dropped from criminal liability (thus, the civil judge can autonomously ascertain the existence of a criminal offence in order to award non-pecuniary damages). The jury is not present. There is the principle by which the losing party pays the attorneys' fees of the winning party as well as his own. The economic theory does not apply. So, the conclusion is that punitive damages are aliens and cannot be transposed in the Italian juridical system.

³⁵ See A. DORFMAN, *What is the point of the tort remedy?*, in *Am. J. Jurisprudence*, 2010, p. 153, who stated that «in the end, the puzzle of punitive damages remains unsettled, urging for an adequate explanation of the authority vested in private individuals to inflict punishment on their fellow citizens and, moreover, to hold onto the punishment's economic value».

³⁶ See M. TESCARO, *op. cit.*, according to which in the modern age, a net distinction between criminal remedies, aiming to punish and deter, and private remedies, aiming to compensate and restore, has been established in the Italian juridical system. However, this does not mean that only criminal remedies should carry out punitive and deterrent functions.

For instance, with reference to the U.S. system, it has been suggested to adopt a “mid-level burden of proof”, such as that of “clear and convincing evidence”, in order to guarantee a sufficient degree of procedural fairness to the defendant³⁷. Thus, by introducing a higher mid-level burden of proof which benefits the defendant, Italy may easily resolve one of the most discussed problems surrounding punitive damages³⁸.

As regard to the “double-jeopardy” clause and the issue of whether it can counsel against the adoption of punitive damages in Italy, first of all, the U.S. Supreme Court has stated that if a civil sanction constitutes a form of punishment it activates the “double-jeopardy” clause³⁹. However, the Court added that the Fifth Amendment guarantee did not apply to private party’s litigation. So, the “double-jeopardy” guarantee does not apply to U.S. punitive damages in most cases.

In this respect, it can be argued that the “double jeopardy” guarantee applies to punishment in its broadest meaning, encompassing criminal as well as civil punitive sanctions, with the consequence that no one could be punished more than once for the same misconduct, in either criminal or civil proceedings.

However, this type of guarantee is enshrined not in some Italian constitutional provisions, but rather in article 649 of the Code of Criminal Procedure, according to which no one can be prosecuted twice

³⁷ See P. GALLO, *Pene private e responsabilità civile*, cit., pp.186-211, explaining that in both the United States and Italy “beyond all reasonable doubt” applies to criminal cases whereas “more probable than not” applies to civil cases.

³⁸ See M. CAPPELLETTI, *Punitive damages and the public/private distinction: a comparison between the United States and Italy*, in *Arizona Journal of International & Comparative Law*, Vol. 32, No. 3, 2015, p. 839, according to which «to be sure, the traditional “more probable than not” standard invariably applies to civil proceedings involving the legislative provisions performing punitive functions. This may prima facie suggest that so long as a sanction, independently of its nature, is imposed in civil proceedings the Italian system would not investigate the advisability of requiring heightened standards of proof. However, should the Italian system adopt punitive damages as a general remedy, the issue of the burden of proof would in all likelihood become a relevant and pressing one, to be resolved with the adoption of heightened guarantees».

³⁹ *United States v. Halper* 490 U.S., 1989, pp. 435-442.

for the same crime. Hence, it appears more accurate to make a distinction between civil punitive sanctions and criminal sanctions, with the consequence that the procedural safeguards typically characterizing Italian criminal proceedings⁴⁰ may be deemed to be unnecessary when it comes to civil, even punitive, sanctions⁴¹.

Finally, the principle of legality (*nulla poena sine lege*) is another relevant aspect, as regard to the division between criminal law and tort law.

According to this principle, only the legislator can set forth the circumstances under which an individual may be punished for his conduct and empower the judge to apply a punitive measure⁴².

It can be argued that, if Italian tort law pursues exclusively a compensatory function, compliance with the principle of legality is not required, because it applies only to punishment.

But what if Italian tort law pursues also punitive and deterrent goals?

In this case the principle of legality raises an issue that must be addressed before adopting punitive damages or any other form of civil punitive sanction, since, according to Italian constitutional principles, neither criminal nor civil punitive awards may be granted unless the judge is *ex ante* authorized by the legislator to do so. In fact, it has been argued⁴³ that if anyone had the power to inflict sanctions, as a consequence of a suffered tort, the principle of legality would be infringed. However, in order to solve the issue, a legislative intervention should be enough to

⁴⁰ E.g. “beyond all reasonable doubt” standard of proof, “double-jeopardy” guarantee.

⁴¹ See L. DI BONA DE SARZANA, *op. cit.*, pp. 563-572.

⁴² The principle of legality is enshrined in Article 25, Clause 2 of the Italian Constitution, which states «no one may be punished except on the basis of a law in force prior to the time when the offence was committed». On the contrary, see F. BRICOLA, *Le ‘pene private’ e il penalista*, in *Le pene private*, F. BUSNELLI- G. SCALFI (eds.), arguing that the relevant provision is Article 23 of the Italian Constitution, which states «no obligations of a personal or a financial nature may be imposed on any person except by law».

⁴³ See M. LA TORRE, *op. cit.*, p. 426, according to which the principle of legality is an insuperable barrier, which stands as a limit against private individuals’ contractual autonomy and against the judge, when exercising judicial powers.

alleviate legitimate concerns of legality, confirming that the *nulla poena sine lege* difficulty is simply a matter of legal engineering⁴⁴.

b. Second objection

With respect to the second objection, namely the relationship between juries and punitive damages, it has been argued that jurors do not possess the same degree of experience and competence usually belongs to judges. Thus, juries should not be allowed to determine the amount of punitive damages, but such determination should be deemed only to judges⁴⁵. The consequence which it is aimed to avoid is the possibility that, by awarding unacceptable large amounts of punitive damages, the plaintiff benefits from the offence.

However, some legal scholars have claimed that the role of the jury should not bar the adoption of punitive damages in Italy, since the introduction of more precise instructions to the jury and the admission of proof relating to the amount of punitive damages, after having assessed the *an*, are sufficient remedies⁴⁶.

Moreover, punitive damages are not a prerogative of juries, since judges often award them as well⁴⁷. In addition, the jury, as an institution, is not an essential feature of punitive damages.

Thus, punitive damages, if adopted, could be awarded by Italian judges, the jury being absent⁴⁸.

⁴⁴ See M. Cappelletti, *op. cit.*, p. 840.

⁴⁵ R. HASTIE-W.K. VISCUSI, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, in 40 *Ariz. L. Rev.*, 1998, pp. 901-916; M. GALANTER-D- LUBAN, *Poetic Justice: Punitive Damages and Legal Pluralism*, in 42 *Am. U. L. Rev.*, 1993, pp. 1393-1439.

⁴⁶ See V. ZENO-ZENCOVICH, *op. cit.*

⁴⁷ T. EISENBERG et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, in 87 *Cornell L. Rev.*, 2002, p. 746, according to which, as demonstrated by an empirical study conducted at the beginning of the 21st century, there is «no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory awards».

⁴⁸ See M. CAPPELLETTI, *op. cit.*, p. 841, according to which, «his is no surprise given that judges and juries are functional equivalents, i.e. they are both adjudicators. There seems to be no real reason to consider the American jury and its role in punitive

c. Third objection

As regard to the American rule, according to which each party pays his own attorneys, it has been argued that, since in the U.S. the Italian principle⁴⁹, according to which the losing party pays the attorneys' fees of the winning party as well as his own, does not exist, U.S. judges consciously award (punitive) damages covering attorneys' fees. If they fail to do so, the plaintiff would not be wholly compensated, considering that "at least one-third of the plaintiff's recovery ordinarily is expended on legal fees⁵⁰".

However, many scholars believe that the American rule does not counsel against the adoption of punitive damages, even if the legal expenses represented one-third of the punitive award, a substantial part of it would still call for a justification, since it can be traced to punishment and deterrence⁵¹.

d. Fourth objection

According to the fourth objection, the absence of an economic theory of law constitutes a further reason for not adopting punitive damages in Italy.

However, first of all, the idea of deterrence and the efficient allocation of resources must not be confused.

The former can be pursued independently of efficiency-driven rationales⁵². Thus, it would be a mistake to think that the notion of

damages cases an insurmountable obstacle to the reception of punitive damages in Italy. Punitive damages, if adopted, could and should be awarded by Italian judges, the other form of adjudicator (the jury) being absent».

⁴⁹ Such a regime is established by Article 91 of the Italian Code of Civil Procedure.

⁵⁰ See D.G. OWEN, *op. cit.*, p. 379.

⁵¹ See M. CAPPELLETTI, *op. cit.*, p. 842, according to which «actually, the view here criticized would be tenable if the attorneys' fees owed by the plaintiff accounted for punitive damages in their entirety or for nearly all the amount. But this is not the case. [...] In other words, it is not reasonable to regard punitive damages as merely absorbing plaintiffs' legal expenses».

⁵² E.g., in Italy, the deterrence is pursued in the field of criminal law, not by applying the instruments elaborated by economists committed to efficiency, but rather by

deterrence at some point collapsed into that of efficiency simply because of the contribution given by efficiency-based theories to the pursuit of deterrence.

Furthermore, it must be clarified that punitive damages flourished in the United States in the mid-18th century, whilst law and economic movement is much younger⁵³. Thus, it can be argued that punitive damages were born in order to pursue deterrence (and punishment), but without any efficiency-driven considerations.

Consequently, it can be concluded that a legal system does not necessarily need law and economics theories before adopting a legal tool such as that represented by punitive damages.

3. Decisions of the Italian Supreme Court

In order to verify whether a legal transplant of the punitive damages remedy is possible in Italy, it is of primary importance to analyze the approach of the Italian jurisprudence.

In the following sections, several decisions of the Italian Supreme Court (*Corte di Cassazione*) will be examined, starting from the ruling of 17th January 2007, n. 1183, till the judgement of 5th July 2017, n. 16601.

3.1 Corte di Cassazione 17 January 2007, n. 1183

The facts of the case related to the enforcement in Italy, of a U.S. court decision which had ordered an Italian safety helmet buckle manufacturer to pay damages amounting to U.S. \$ 1 million as punitive damages to a

focusing on the idea of fairness. The same is true also with reference to Italian tort law. Deterrence is one of the goals domestic tort law pursues, but efficiency has never been an element consciously used to seek deterrence.

⁵³ The birth of modern law and economics is generally thought to coincide with Ronald Coase and Guido Calabresi. See K. GRECHENIG-M. GELTER, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, in 31 *Hastings Int'l & Comp. L. Rev.*, 2008, pp. 295-325, according to which «Ronald Coase and Guido Calabresi, who are typically described as the founding fathers of the law and economics movement [...]»; R. H. COASE, *The Problem of Social Cost*, in 3 *J. L. & Econ.*, 1960, p. 1 f.; G. CALABRESI, *Some Thoughts on Risk Distribution and the Law of Torts*, in 70 *Yale L. J.*, 1961, p. 499 f.

road accident victim who suffered lethal injuries as a consequence of the defective working of the helmet buckle⁵⁴.

In the previous decision⁵⁵, the Court of Appeal had refused to enforce the judgement, holding that punitive damages violate Italian public order⁵⁶. In upholding the Court of Appeal's decision, the Supreme Court

⁵⁴ Cass., Sez. III, 17th January 2007, n. 1183, in *Foro it.*, 2007, I, 1460. This judgement follows a previous German decision of 1992, within which the *Bundesgerichtshof*, by refusing the enforcement of an American judgement, stated that punitive damages are private penalties and are, thus, contrary to the fundamental principles of the German juridical system, since the *Grundgesetz* establishes the monopoly of the criminal judge as regard sanctions.

⁵⁵ App. Venice 15th October 2004, in *NGCC*, 2002, I, 765, with a commentary by G. CAMPEIS-A. DE PAULI, *Danni punitivi, ordine pubblico e sentenze straniere deliberande a contenuto anfibio*, in *RDIPP*, I, 2002, p. 774 f., which states that according to art. 64, statute 31st May 1995, n. 218 (Statute on International Private Law), foreign court decisions are recognized in Italy without the need to have recourse to any procedure as long as certain requirements are met: as long as, among other considerations, they do not «produce effects which are contrary to ordre public». Disputes related to the enforcement of foreign court decisions in Italy are governed by art. 796-805, Code of Civil Procedure.

⁵⁵ Venice Court of Appeal 15th October 2001, in *RDIPP*, 2002, pp. 1021 f.

⁵⁶ The Court of Appeal forwarded two obstacles to the enforcement of the American judgement: first of all, punitive damages have a criminal nature (and so, also the judgement which awarded them) and, secondly, the reasoning concerning the determination of the amount of punitive damages was omitted. As regard the first objection, the Court of Appeal has stated that the principles which govern the Italian tort law qualify damages as a compensation of the prejudice caused to the victim. Moreover, in the Italian juridical system there are no remedies comparable to punitive damages; there are some forms of private penalties (such as the *clausola penale* provided for in art. 1382, civil code), but the quantification of the damage precedes its realization (and so, punitive damages could not be compared). Then, in the United States it is not the society, but the sole plaintiff who benefits from the award of punitive damages and, thus, enjoys an unjust enrichment (according to the fundamental principles which govern the Italian juridical system). So, according to the Court of Appeal, punitive damages are an exercise by a private individual of a public function and, as a consequence, they are contrary to the public order. The Court has deduced the criminal nature of punitive damages from the fact that the plaintiff brings an action by acting as a Private Attorney General. The outcome would have been different if the entire society had benefitted from the award. As regard the second objection, the American judgement did not contain any indication of the criteria in order to quantify the amount of damages imposed on the Italian safety helmets buckle manufacturer.

denied enforcement on the ground that the U.S. decision conflicts with the Italian public order⁵⁷, since the function of Italian tort law is compensatory, and, thus, punishment and deterrence must be alien to it⁵⁸. Furthermore, the Court argued that punitive damages are disproportionate to the harm actually suffered by the victim and that they are related to the wrongdoer's conduct and not to the harm done⁵⁹. Finally, the Court stated that the wrongdoer's conduct and wealth are and must be irrelevant to the idea of compensating damages and to Italian tort law more generally.

Such indication would have highlighted the type of damage (punitive or compensatory) and, thus, on the nature of the judgement (whether criminal or not). Since there is not a reasoning, the criminal nature of such a high damage is presumed.

For a commentary, see S. CORONGIU, *Pregiudizio subito e quantum risarcitorio nelle sentenze di punitive damages: l'impossibile riconoscimento in Italia*, in *Int'l Lis-Corriere Giuridico*, 2, 2004, p. 90, according to which «il nostro sistema di responsabilità civile si caratterizza infatti per l'impianto risarcitorio e non sanzionatorio»; on the contrary, see G. CAMPEIS-A. DE PAULI, *op. cit.*, p. 774 according to which «la condanna al risarcimento del danno punitivo è quindi in astratto riconoscibile secondo le norme del rito generale in quanto il contenuto, pur in parte anfibio, si colloca pur sempre nell'area di un rapporto interpretativistico, senza che l'interesse pubblico abbia una sua tutela se non in via del tutto indiretta e mediata».

⁵⁷ See A. DE PAULI, *Danni punitivi e contrarietà all'ordine pubblico*, in *Resp. Civ. Prev.*, 10, 2007, pp. 2013-2014, according to which the term “public order” refers to the constitutional norms and ordinary law regulating the remedies of the juridical system, by constantly conforming with the evolution of the society.

⁵⁸The Supreme Court stated that: «tort law aims at re-establishing the economic integrity of persons who sustained a loss. It does so by granting victims an amount of money directed at eliminating the consequences of the loss suffered». Moreover, «[t]he objective of punishment and of sanction is alien to the system and for that purpose, the examination of a wrongdoer's conduct is irrelevant. Punitive damages cannot even be referred to as compensation for non-pecuniary damage or pain and suffering (*danno morale*) ». Therefore, «any identification or even a partial setting of compensation for pain and suffering on an equal footing with punitive damages is erroneous». The Supreme Court concluded that «so-called punitive damages are not eligible as compensation, since they conflict with fundamental principles of state law, which attribute to tort law the function of restoring the economic sphere of persons suffering a loss». Therefore, a foreign court decision ordering a tortfeasor to pay punitive damages, thereby seeking to punish the wrongdoer, is not enforceable in Italy.

⁵⁹ The Court seemed to think that the harm the victim suffered, rather than the defendant's wrongful action, should be the central element of tort law.

It is worth analyzing these issues separately.

a. Does Italian tort law pursue only a compensatory function?

The first objection to punitive damages, raised by the Supreme Court, is that Italian tort law⁶⁰ has only a compensatory function. Thus, the purposes of punishment, deterrence and sanction are alien to such system.

However, it is fundamental to underscore that such assertion is not in line with the gradual process of transformation that Italian tort law has experienced since 1960s⁶¹. In fact, leading scholars have paved the way toward an approach that attributes a plurality of functions to tort law⁶². In this respect, fundamental is the contribution of Rodotà⁶³, according to which the punitive function appears as a non-disposable feature of the system of tort law.

Furthermore, thanks to the contribution of C. Salvi⁶⁴, the debate on the possible functions of tort law became much more aware and this lead to

⁶⁰ The general provision governing fault-based torts is Article 2043 of the Italian Civil Code, which states, «any intentional or negligent fact, which causes an unjust harm to others, obliges the author of the fact to compensate the loss».

⁶¹ See G. CIAN, *Antigiuridicità e colpevolezza. Saggio per una teoria dell'illecito civile*, Padova, 1966, according to which «nel sistema della responsabilità civile devono incidere non soltanto gli interessi del soggetto leso, ma anche quelli della persona cui si vorrebbe addossare il peso del risarcimento».

⁶² See P.G. MONATERI, *La responsabilità civile*, in *Tratt. Sacco*, Torino, 1998, p. 337; P. CENDON, *Il profilo della sanzione della responsabilità civile*, in *La responsabilità extracontrattuale*, P. CENDON (ed.), Milan, 1994, pp. 71 f., according to which Italian tort law has *per se* a punitive element, which can be inferred by artt. 1223, 1226 and 2056, as the minimum content of compensation, and by the equitable powers of the judge (*poteri equitativi*). In fact, the judge, by taking into account, apart from the loss suffered by the victim, the unlawful behavior of the tortfeasor, his degree of guilty and his enrichment, may apply a remedy which serves also to punish the unjust behavior and dissuade the tortfeasor and the other members of the society to repeat the action.

⁶³ S. RODOTÀ, *Le nuove frontiere della responsabilità civile*, in M. COMPORTI-G. SCALFI (eds.), *Responsabilità civile e assicurazione obbligatoria*, Milan, 1988, pp. 30 f.

⁶⁴ C. SALVI, *Il paradosso della responsabilità civile*, in *Riv. Crit. Dir. Priv.*, 1983, p. 12.

the conclusion that it is impossible to identify an exclusive function of the system of tort law⁶⁵.

For these reasons, many legal scholars⁶⁶ have severely criticized the decision of the Supreme Court, as regard to the function of tort law. Even if Italian tort law has always aimed to compensate the plaintiff because of the injury suffered, the idea that tort law performs also punitive and deterrent functions became widespread⁶⁷.

⁶⁵ Process culminated in the decision of *Corte di Cassazione* 5th July 2017, n. 16601, see *infra* 3.4.

⁶⁶ See G. PONZANELLI, *Danni punitivi: no, grazie.*, in *Foro it.*, I, 2007, p. 1460, according to which the Supreme Court has been disappointing when stating that tort law assolves only a compensatory function («Delude, soprattutto, la Cassazione quanto individua nella sola riparazione del danno attraverso l'equivalente monetario, la funzione della responsabilità civile. Finalità deterrenti, non anche punitive, risultano estranee e hanno rilevanza solamente negativa per l'ordinamento, che, quindi, non può riconoscere efficacia alle decisioni nordamericane contenenti condanne monetarie esemplari. Insomma, la responsabilità civile deve riparare e basta; laddove essa si cimenti in qualche cosa di diverso e altro, ciò non merita alcuna considerazione. Ora, quest'affermazione non pare rispettosa della dinamica della responsabilità civile. Negli ultimi quarant'anni, la responsabilità civile ha sì maturato una valenza riparatoria sempre più forte e precisa, ma si è poi confrontata anche con altre finalità, diverse dalla riparazione del danno»).

⁶⁷ See M. TESCARO, *op. cit.*, according to which the functions of Italian tort law should be as follow: compensative (meaning that tort law aims to compensate the economic loss suffered by the victim), satisfactory (aiming to appease the victim, through the payment of a certain amount of money), preventive or deterrent (aiming to avoid that the tortfeasor or other members of the society perform other offenses in the future) and punitive (aiming to punish the author of an outrageous conduct); See G.M.D. ARNONE-N. CALCAGNO-P.G. MONATERI, *Il dolo, la colpa e i risarcimenti aggravati dalla condotta*, Torino, 2014, pp. 33-34, according to which tort law has several functions and none of them is able alone to explain the complex system of tort law. The Authors have identified three main functions: compensation, punishment and prevention; See G. ALPA, *cit.*, who identifies four functions of tort law: a) the function of reacting at the offence, by compensating the victim, b) the function of restoring the *status quo ante* in which the victim stayed before suffering the harm, c) the function of reaffirming the punitive power of the State, and, d) the function of deterring all those who, negligently or intentionally, aim to commit offences.

Moreover, see G. PONZANELLI, *I danni punitivi*, *cit.*, p. 31, according to which the principle of overall compensation of the damage (principio di integrale riparazione del danno), which states that the victim should be placed in the same situation in which it

In fact, the dominant thesis⁶⁸ among legal scholars is that the Italian system of tort law cannot be explained by focusing only on a single function, even if the traditional approach, according to which the compensative function is the dominant one, still exists⁶⁹.

However, it has been highlighted that also compensatory damages appear to convey a deterrent message. In fact, every person knows that if he wrongfully harms someone else, he may be judicially ordered to pay for the harm caused. Thus, the threat of a legal sanction may well

was before the injury was committed, does not seem to prevent tort law to pursue a punitive function as well, at least when the law provides for a justification of such aim.

⁶⁸ See P. PERLINGIERI, *Le funzioni della responsabilità civile*, in *Rass. Dir. Civ.*, I, 2011, p. 119, according to which «La responsabilità civile non può avere un'unica funzione, ma una pluralità di funzioni (preventiva, compensativa, sanzionatoria, punitiva) che possono tra loro coesistere»; F. QUARTA, *La funzione deterrente della responsabilità civile*, Napoli, 2010, p. 129 f., according to which, by criticising the traditional approach which attributes to tort law exclusively a compensatory function, promotes a broader use of “ultracompensative” private penalties, determined on the basis of guilty of the tortfeasor. On the contrary, see C. CASTRONOVO, *Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale*, in *Eur. Dir. Priv.*, 2008, p. 329; P. FAVA, *Funzione sanzionatoria dell'illecito civile? Una decisione costituzionalmente orientata sul principio compensativo conferma il contrasto tra danni punitivi e ordine pubblico*, in *Corriere giur.*, gennaio 2009, pp. 526-529, affirming the necessity of preserving the distinction between public and private law. On this account, the idea of introducing a punitive flavor into tort law is unacceptable, and deterrence is admissible only if it operates without undermining the principles of corrective justice.

⁶⁹ See A. ZACCARIA, sub art. 1223 c.c., in *Commentario breve al codice civile*, G. CIAN-A. TRABUCCHI (eds.), Padova, 2011, p. 1276, according to which «funzione primaria dell'obbligazione di risarcimento è la compensazione del pregiudizio arrecato, la restaurazione (almeno equivalente) della situazione del lego antecedentemente all'illecito». Moreover, it has been highlighted that the word “damages” (risarcimento) implies a compensation and, thus, the expression punitive damages (risarcimento sanzionatorio) seems to be a contradiction in terms. See C. CASTRONOVO, *Il risarcimento punitivo che risarcimento non è*, in *Scritti di comparazione e storia giuridica*, P. CERAMI-M. SERIO (eds.), Torino, 2011, p. 102, according to which, the fact that “compensation” means “to restore” and not “to punish” can be inferred also from the Latin etymology, *resarcire*, composed by *re* and *sarcire*, meaning “to mend” or “to patch”, and, figuratively, “to restore”.

make many people desist from their intentional misconduct or act more prudently in carrying on their daily activities⁷⁰.

Accordingly, deterrence is a common effect of tort liability, even if the State does not assess tort damages with the goal of deterrence in mind. Furthermore, in order to show that the Italian tort system is not so reluctant to provide for more-than-compensatory damages in cases of outrageous conduct, it is worth analyzing some examples.

In specific circumstances relating to the exercise of parental powers during the procedure for obtaining a separation between husband and wife, article 709-ter of the Italian Code of Civil Procedure empowers the judge, if one of the parents does not comply with previous orders issued by the judge himself, to: (i) admonish the non-compliant parent; (ii) condemn him or her to compensate damages inflicted on the child; (iii) condemn him or her to compensate damages inflicted on the other parent; and (iv) condemn the non-compliant parent to pay a monetary administrative sanction.

Since from the norm it is not possible to extract a precise indication, many legal scholars, including the jurisprudence, have tried to identify the proper meaning of the legal norm. A first approach traces the instruments provided for in article 709-ter back to tort law⁷¹, whilst a second approach seems to consider such article as an instance of punitive damages⁷².

⁷⁰ M. CAPPELLETTI, *op. cit.*, p. 824, according to which «even assuming that a state, when initially setting up tort liability and tort damages, has in mind the exclusive objective of allowing the victim to seek redress for the harm suffered, it is unlikely that as soon as it becomes aware of the deterrent potentialities of tort law, the state will not start recalibrating existing tort liability provisions or adding new ones in order to deter potential wrongdoers and increase social peace».

⁷¹ App. Firenze 22nd -29th August 2007, in *Fam. pers. succ.*, 2008, p. 370 f.; Trib. Pavia 23rd October 2009, in *Fam. dir.*, 2010, p. 149, with a commentary of A. ARCERI, *La responsabilità da privazione genitoriale al vaglio della giurisprudenza di merito: due differenti forme di tutela per l'identico diritto costituzionalmente garantito*; Trib. Salerno 22nd December 2009, in *Fam. dir.*, 2010, p. 924.

⁷² See F. DANOVI, *Le misure ex art. 709 ter c.p.c. in appello tra oneri di impugnazione e poteri del giudice*, in *Fam. Dir.*, 2016, p. 174 f.; E. CANAVESE, *Evoluzioni giurisprudenziali sull'art. 709 ter c.p.c.*, in *Giur. It.*, 2014, p. 10 f.; N. DE SALVO, *Il risarcimento del danno ex art. 709 ter comma, 2, n. 2, c.p.c. come pena privata*, in *Fam. dir.*, 2012, p. 613 f.; I. ZINGALES, *Misure sanzionatorie e processo civile: osserva-*

Particularly interesting is a decision of the Tribunal of Messina⁷³, which, distinguishing article 709-ter, Code of Civil Procedure, from articles 2043-2059 of the Civil Code, the cornerstones of tortious liability in Italy, tells us that the monetary obligations imposed by provisions (ii) and (iii) on the non-compliant parent «constitute a form of punitive damages, that is a private sanction not traceable to articles 2043-2059 c.c.».

The reasons why, as argued by some scholars, a punitive nature is attributed to provisions expressly framed in terms of compensatory damages are that (1) the proof of harm is unnecessary to get a damages

zioni a margine dell'art. 709 ter c.p.c., in *Dir. Famiglia*, 2009, p. 404 f.; F. FAROLFI, *L'art. 709 ter c.p.c.: sanzione civile con finalità preventiva e punitiva?*, in *Fam. dir.*, 2008, p. 610 f.; E. LA ROSA, *Il nuovo apparato rimediato introdotto dall'art. 709 ter c.p.c. I danni punitivi approdano in famiglia?*, in *Fam. dir.*, 2008, p. 64 f.; M. IANNACCONE, *Affidamento condiviso e mantenimento della residenza dei figli*, in *Fam. dir.*, 2007, 1052 f. As regard to the case-law, see Trib. Termini Imerese 12nd July 2006, in *Foro it.*, 2006, p. 3243 f.; Trib. Pisa 20th December 2006, in *Fam. dir.*, 2007, p. 1051 f.; Trib. Messina 5th April 2007, in *Fam. dir.*, 2008, p. 60 f.; Trib. Palermo 2nd November 2007, in *La responsabilità civile*, 2008, p. 89 f.; Trib. Napoli 30th April 2008, in *Fam. dir.*, 2008, p. 1024 f.; Trib. Verona 11th February 2009, in *Fam. pers. succ.*, 2011, p. 710; Trib. Padova 30th October 2009, in *Fam. dir.*, 2009, p. 610; Trib. Novara 21st July 2011, in *Fam. dir.*, 2012, p. 612; Tribunale di Roma, Sez. I civ., 23rd January 2015, n. 3203.

⁷³ Trib. Messina, 5th April 2007, in *Fam. Dir.*, 2008, p. 60 f., according to which «Il risarcimento del danno previsto dai punti 2 e 3 dell'art. 709 ter c.p.c. costituisce una forma di *punitive damages* ovvero di sanzione privata, non riconducibile al paradigma degli artt. 2043 e 2059 c.c. Non è ostativa l'osservazione che il nostro sistema giuridico non conosce la categoria dei danni punitivi, perché la l. n. 54/2006 in tema di affidamento recepisce largamente l'esperienza anglosassone e nordamericana e di conseguenza ben può introdurre un *quid novum*, segnatamente quella condanna al risarcimento del danno che non è diretta a compensare ma a punire, al fine di dissuadere (*to deter*) chi ha commesso l'atto illecito dal commetterne altri. Si tratta di un sistema di poteri di coercizione, volti a rendere il provvedimento di affidamento attuale e in ultima analisi a realizzare l'interesse del minore a conservare un rapporto equilibrato e continuativo con entrambi i genitori». Moreover, see M. PALADINI, *Responsabilità civile nella famiglia: verso i danni punitivi?*, in *Resp. Civ. Previd.*, 10, 2007, p. 2005, according to which, since criminal remedies are proved ineffective, the field of family law could be the starting point for the introduction of a general clause of punitive damages, aiming to repress those conducts characterized by malice and intentional non-compliance of parental obligations.

award⁷⁴ under (ii) and (iii), and (2) the amount of the monetary sanction is not related to the harm the child suffered but rather to the wrongful conduct⁷⁵. Although few scholars⁷⁶ reject this view and argue that the discussed provision may not have a punitive function, it is relevant that a majority of courts and commentators agree on the fact that the legislative provision under scrutiny does not serve a merely compensatory function, and that deterrent and/or punitive rationales can be adduced as foundational to it (independently of whether article 709-ter, Code of Civil Procedure, represents an instance of punitive damages or not).

Another illustrative piece of legislation is article 96, clause 3, of the Italian Code of Civil Procedure, which establishes that a judge can condemn the losing party to pay the winning party an equitably determined sum if the former adopted a highly reprehensible⁷⁷ procedural conduct.

⁷⁴ A. RICCIO, *I Danni Punitivi non sono, dunque, in contrasto con l'ordine pubblico interno*, in *Contratto e Impresa*, 4-5, 2009, pp. 854-867; A. D'ANGELO, *Il risarcimento del danno come sanzione? Alcune riflessioni sul nuovo art. 709-ter c.p.c.*, in *Famiglia*, 2006, pp. 1048 f.

⁷⁵ E. LA ROSA, *Il nuovo apparato rimediale introdotto dall'art. 709-ter c.p.c.: i danni punitivi approdano in famiglia?*, in *Fam. Dir.*, 2008, pp. 64-72., according to which such norm has a punitive nature, since it focuses on the gravity of the parental conduct. Moreover, art. 709-ter bases at the adoption of sanctions any act that prejudices the minor and that hampers the correct functioning of the custody. Thus, such norm has to be considered as a form of punitive damages.

⁷⁶ See F.D. BUSNELLI, *La Funzione Deterrente e le Nuove Sfide della Responsabilità Civile*, in *Funzione deterrente della responsabilità civile – Alla luce delle riforme straniere e dei principles of European Tort Law*, P. SIRENA (ed.), 2011; A. D'ANGELO, *L'art. 709 ter c.p.c. tra risarcimento e sanzione: un "surrogato" giudiziale della solidarietà familiare?*, in *Danno e responsabilità*, 12, 2008, p. 1193 f.; M. PALADINI, *Misure sanzionatorie e preventive per l'attuazione dei provvedimenti riguardo ai figli, tra responsabilità civile, punitive damages e astreinte*, in *Fam dir.*, 2012, p. 855 f. See Tribunale di Roma, Sez. I civ., 23rd January 2015, n. 3203, in *Danno e responsabilità*, 4, 2016, pp. 409 f., with a commentary of L. Polonin, according to which, since the legislator does not aim solely to punish the conduct of the parent, because the prominent objective is the protection of the minor, art. 709-ter should not entail a punitive damage.

⁷⁷ Typically, intentional or grossly negligent.

There are various judicial and doctrinal theories regarding the nature of the sanction a judge may impose on the basis of this provision. Particularly interesting is a decision issued by the Tribunal of Piacenza in 2011⁷⁸ that condemned the losing party to pay not just the other party's legal expenses, but also an additional sum equaling the litigation costs, on the grounds that article 96, clause 3, constitutes an instance of punitive damages⁷⁹. Thus, the Tribunal concluded by asserting that (i) this legislative provision requires only the proof of bad faith or gross negligence, and not of the existence of an actual harm to the other party, and that (ii) there are no constitutional provisions prohibiting the legislator from providing for such damages. Moreover, fundamental is the final decision of the Italian Constitutional Court⁸⁰, which stated that such provision aims to punish all the conducts of those who, by abusing the right of defense and of action, use the proceeding as a dilatory instrument. Thus, the Court describe the measure in question as an instrument that punishes an abusive procedural behavior and has a deterrent effect.

⁷⁸ Tribunale di Piacenza, 15th November 2011, in *NGCC*, 2012, p. 269 f., with a commentary of L. FRATA, *L'art. 96, comma 3°, cod. proc. Civ. tra "danni punitivi" e deterrenza*, pp. 271-278, according to which «istanze di deterrenza, quindi, ben possono essere perseguite all'interno della responsabilità civile. Tuttavia, si può ritenere che l'istituto introdotto all'art. 96, comma 3o, sfuggendo a precisi inquadramenti nelle consolidate categorie civilistiche, costituisca un momento "non riparatorio" che si colloca al di fuori dell'area della responsabilità civile. Tale previsione svolge una funzione diversa da quella risarcitoria, essendo improntata essenzialmente ad obiettivi di deterrenza. La prevenzione pare esplicitarsi su un duplice fronte, risultando finalizzata alla tutela dell'interesse pubblicistico all'efficienza del sistema giudiziario civile, e a quello del privato a non essere indebitamente coinvolto in una lite temeraria. L'apparente mancanza di un pregiudizio, la discrezionalità attribuita al giudice nella valutazione sia dell'*an* che del *quantum* della condanna, il pagamento della somma a favore della controparte, anziché dello Stato, sono tutti elementi che deporrebbero per la natura di "sanzione civile"».

⁷⁹ Similar conclusions are reached by Trib. Milano, 4th March 2011, in *Foro it.*, 2011, I, pp. 2184 f.; Trib. Rovigo, 7th December 2010, in *Il Civilista*, 2010, p. 10 f.; Trib. Varese, Sez. Luino, 23rd January 2010, in *Foro it.*, 2010, 7-8, I, p. 2229 f.

⁸⁰ Corte Costituzionale 23rd June 2016, n. 152, in *Foro it.*, 2016, I, p. 2639 f.

Therefore, regardless of whether it is appropriate to qualify art. 96, clause 3, Code of Civil Procedure, as an instance of punitive damages⁸¹, what is undisputable is that such measure pursues punitive and deterrent goals.

Finally, what emerges from the foregoing analysis is that the Supreme Court, which has depicted Italian tort law as concerned only with compensation, ignored that tort law pursues and produces deterrent effects, and it did not take into account a number of instances in which this specific area of tort law serves punitive and deterrent functions⁸².

b. Disproportion between damages awarded and harm actually suffered

The second objection the Italian Supreme Court made was that punitive damages are «characterized by an unjustifiable disproportion between the damages awarded and the harm actually suffered by the plaintiff». This argument might have been true, but today it has little force because

⁸¹ See A. GRASSI, *Il concetto di “danno punitivo”*, in *Tagete*, VI, fasc. 1, 2000, p. 107, according to which article 96 c.p.c. constitutes the foundation of «Italian punitive damages».

⁸² See M. CAPPELLETTI, *op. cit.*, p. 828, which states that «this judicial approach, supported by some scholars as well, is descriptively inaccurate and ought to be rejected».

Moreover, there has been a previous judgement of the Italian Constitutional Court (C. Cost. 184/1986), which had already affirmed the “polifunctional” nature of Italian tort law. In fact, the Court affirmed the following principle: «[...] è impossibile negare o ritenere irrazionale che la responsabilità civile da atto illecito sia in grado di provvedere non soltanto alla reintegrazione del patrimonio del danneggiato ma fra l’altro, a volte, anche ed almeno in parte, ad ulteriormente prevenire e sanzionare l’illecito [...]»). Posto che: a) l’art. 2059 c.c. attiene esclusivamente ai danni morali subiettivi e non esclude che altre disposizioni prevedano la risarcibilità del danno biologico, per sé considerato; b) il diritto vivente individua nell’art. 2043 c.c., in relazione all’art. 32 Cost., la disposizione che permette la risarcibilità, in ogni caso, di tale pregiudizio, è infondata la questione di legittimità costituzionale dell’art. 2059 c.c. nella parte in cui prevede la risarcibilità del danno non patrimoniale derivante dalla lesione del diritto alla salute soltanto in conseguenza di un reato, in riferimento agli artt. 2, 3, 24 e 32 Cost.».

of the U.S. Supreme Court's "constitutionalization" of punitive damages⁸³.

In fact, the U.S. Supreme Court, while denying that criminal procedural safeguards should be applied to punitive damages, but having in mind, at the same time, the peculiar criminal nature of this civil law remedy, felt the need to establish restrictions aimed at avoiding potential distorting effects, which might result from the great discretion allowed to the jury.

Thus, the Italian Supreme Court has not taken into account the recent jurisprudence of the U.S. Supreme Court, according to which an award of punitive damages must comply with the principles of reasonableness and proportionality.

⁸³ In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court, first, acknowledged that courts and juries have a degree of discretion in determining the amount of punitive damages awards and that such discretion had to comply with the principle of reasonableness.

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court issued a decision that explicitly addressed the issue of the "grossly excessiveness" of a punitive damages award. The Court held that, as a general principle, grossly excessive awards violated the Due Process component of the Fourteenth Amendment. Then, in the well-known case of *BMW of North America Inc. v. Gore*, the Court set three guideposts for courts to apply in deciding whether or not the amount of the award determined by juries is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and punitive damages; and (3) the difference between punitive damages and the civil and criminal penalties imposed in comparable cases.

The first occasion the Supreme Court had to apply this three-prong test came soon after, in *State Farm Mutual Automobile Insurance Co. v. Campbell*. The Court declined «to impose a bright-line ratio which a punitive damages award cannot exceed» but held that «few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process». Consistently with its flexible approach, the Court added that «because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages'; by the same token, «[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee». See *infra*

Moreover, even if it might be argued that even this approach of U.S. courts is still not compatible with the principles of proportionality and reasonableness as understood by the Italian legal community, this does not exclude *a priori* the adoption of punitive damages in Italy⁸⁴.

c. Irrelevance of wrongdoer's conduct and wealth

Another argument made by the Italian Supreme Court is that punitive damages are not related to the harm done and that the wrongdoer's conduct is irrelevant to Italian tort law. It is certainly true that punitive damages focus more on the wrongdoer's conduct than on the harm suffered by the victim, since such civil law remedy aims, among its other goals, to punish outrageous conduct. However, the U.S. Supreme Court has stated that there must ordinarily be a close relationship between the amount of the punitive award and the harm suffered by the victim⁸⁵.

More fundamentally, the assertion that the wrongdoer's conduct is irrelevant to Italian tort law is not completely true, since there are several legislative provisions and judicial decisions suggesting that Italian tort law cares not only about the harm suffered by the injured party, but also about the wrongdoer's conduct.

In fact, there are situations in which damages can be awarded only if the wrongdoer's conduct is intentional⁸⁶. But more importantly for present purposes, the wrongdoer's reprehensible conduct has an evident impact on the determination of the amount of compensatory damages,

⁸⁴ See M. CAPPELLETTI, *op. cit.*, according to which « the U.S. metric does not constitute an element that must be imported. Italy may benefit from the U.S. experience and adapt punitive damages to the metric ordinarily used by the Italian legal system in squaring afflictive measures with the principles of reasonableness and proportionality».

⁸⁵ *St. Farm Mut. Auto. Ins. Co.*, 538 U.S. 408, p. 425, «[T]he measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered».

⁸⁶ As art. 709-ter and 96, clause 3, Code of Civil Procedure, seen above, but also calumny, defamation, inducement of breach of contract, and diversion of employees

particularly when the wrongdoing offends the personal, emotional, and non-economic sphere of the victim⁸⁷.

As regard to the wrongdoer's wealth, the Italian Supreme Court has argued that also this is irrelevant for the determination of damages.

In the United States the issue is controversial among scholars. Some economists assert that the wrongdoer's wealth should be considered in quantifying the punitive award in order to ensure the optimal level of deterrence when «either the victim's loss or the defendant's gain from wrongdoing is unobservable and correlated with the defendant's wealth⁸⁸». On the contrary, others argue that this is not the case and that wealth should never be a factor when the wrongdoer is a corporation, whereas it could be relevant, but only in limited circumstances, when the wrongdoer is an individual⁸⁹.

As regard the jurisprudence of the U.S. Supreme Court, the U.S. Supreme Court holds that the defendant's wealth may be a factor to consider in determining the amount of a punitive damages award. However, its relevance must be properly cabined in the sense that the defendant's wealth cannot legitimize a punitive award not comporting with the constitutional limitations of reasonableness and proportionality the Court itself imposed⁹⁰.

⁸⁷ See, P. GALLO, *Pene private e responsabilità civile*, cit.; P. CENDON, *Il dolo nella responsabilità extracontrattuale*, Torino, 1974. Moreover, see Corte d'Appello di Bologna, 10th February 2004, in *Fam. Dir.*, 2006, p. 511 f., according to which, in a case regarding a father who violated his obligations towards his son, an appellate court condemned him to pay € 2.582.284,00.143. Even though the court tried to justify the sum in purely compensatory terms (and on the ground that the father was affluent), the very large amount of the award indicates the court's willingness to punish the wrongdoer because of the particularly high reprehensibility of his conduct.

⁸⁸ K.N. HYLTON, *A Theory of Wealth and Punitive Damages*, in 17 *Widener L. J.*, 2008, pp. 927-930.

⁸⁹ A.M. POLINSKY-S. SHAVELL, *Punitive damages: an economic analysis*, in 111 *Harvard L. Rev.*, 1998, pp. 910-914.

⁹⁰ See in *Pacific Mutual Life Insurance Co. v. Haslip*, the Court mentioned a number of factors that the Alabama Supreme Court elaborated to assess the reasonableness of punitive awards, including the financial position of the defendant, and concluded that these factors impose «a sufficiently definite and meaningful constraint on the discretion of [...] fact-finders in awarding punitive damages». In *TXO*, the Court stated that the punitive damages award was very large but that many factors, including «the

With respect to the situation in Italy, contrary to the Supreme Court's view expressed in 2007, courts frequently refer to the wrongdoer's wealth in determining the amount of damages, especially in the family law context. For instance, in the case of the non-compliant father⁹¹, the court granted very high damages, overtly stating that the wrongdoer's wealth was among the essential elements to be considered in determining the amount of the compensatory award. Some commentators even argue that by astutely "using" the wealth factor, courts camouflage punitive awards by giving them the form of compensatory damages⁹².

In conclusion, the wealth-based objection to punitive damages does not seem to be particularly powerful in light of the fact that (i) wealth to some degree is already relevant within Italian tort law; (ii) the U.S. Supreme Court holds that the defendant's wealth *may* (so, not *must*) be a factor in quantifying punitive damages; and (iii) among U.S. academics the issue of the relationship between the wrongdoer's wealth and punitive damages is unsettled.

3.2 Corte di Cassazione 8 February 2012, n. 1781

The facts of the case related to the enforcement of a decision of the Supreme Court of Massachusetts, which awarded U.S. \$ 5 million to a worker, due to the production of a defective device by an Italian company and the relative damage suffered⁹³.

The Court of Appeal of Turin had allowed the *exequatur* of the U.S. decision, due to the fact that, even if the U.S. ruling did not mention the entitlement of such amount (which was almost 20 times more than what requested by the plaintiff) and no reference to punitive damages was made (that might have justified the amount), the absence of the reasoning did not constitute an obstacle to the enforcement of the

petitioner's wealth», convinced the Court to conclude that such award was not "grossly excessive".

⁹¹ Corte d'Appello di Bologna, 10th February 2004, in *Fam. Dir.*, 2006, pp. 511-514.

⁹² A. D'ANGELO, *op. cit.*

⁹³ Cass., Sez. I, 8th February 2012, n. 1781, in *Foro it.*, 2012, 5, p. 1454 f.

decision⁹⁴. Moreover, as regard to the excessiveness of the award, the Court stated that U.S. judges had taken into account the objective gravity of the damage and that the assertion that the amount was awarded in the form of punitive damages constituted an inadmissible presumption. Thus, the greater amount could have been justified by considering other personal items of losses (such as the youth of the victim, the prejudice in social relations, etc.).

However, in upholding the Court of Appeal's decision, the Supreme Court denied the enforcement of the U.S. decision, based on the fact that, even if there was no reference to punitive damages, such a high amount presumed a punitive function which is extraneous to the Italian juridical system. As we can see, this judgement is almost analogous to the previous one rendered in 2007⁹⁵.

In fact, legal scholars have severely criticized⁹⁶ this decision, on the ground that there was not proof, confirming that the damages were punitive and contrary to the principle of overall compensation of the damage (*principio di integrale riparazione del danno*)⁹⁷.

Moreover, it has been argued that, since the absence of reasoning does not constitute an obstacle to the enforcement, the Supreme Court required a *quid pluris* not provided for by the legal system⁹⁸. Moreover, the Court seemed to consider always as punitive, and, thus, contrary to the public order, all the damages distant from the compensatory model.

⁹⁴ This statement is in line with settled-case law. See Cass. 25th June 2002, n. 9247, in *Foro it.*, I, 2003, p. 209 f.; Cass. 22nd March 2000, n. 3365, in *Giur. It.*, 2000, p. 1786 f.

⁹⁵ Cass. Civ., 17th January 2007, n. 1183, *supra* note 53.

⁹⁶ G. PONZANELLI, *La Cassazione bloccata dalla paura di un risarcimento non riparatorio*, in *Danno e responsabilità*, 6, 2012, p. 613, which stated that «insomma, una decisione non corretta, troppo severa nei confronti della decisione nordamericana, trattata, inconsapevolmente, come se fosse una decisione di merito della giurisdizione italiana».

⁹⁷ Actually, the fact that the damages awarded were higher than those asked by the plaintiff was not sufficient to block the enforcement.

⁹⁸ See G. PONZANELLI, *supra* note, according to which the Supreme Court was probably scared by such a high amount of damages and, thus, increased the requirements necessary for enforcing a foreign judgement.

However, also in the Italian legal system, there are non-compensatory remedies that do not constitute civil punishments⁹⁹.

In conclusion, the rejection to enforce a U.S. decision, on the ground that the presumption of punishment is incompatible with the compensatory function of Italian tort law, contrast also with the progressive process of recognition of such remedies within the European legal system¹⁰⁰.

3.3 Corte di Cassazione 15 April, 2015, n. 7613

This judgement did not concern, as the previous, the enforcement of an U.S. decision awarding punitive damages. Conversely, it regarded the execution in Italy of a Belgian decision, condemning the defendant to pay so-called *astreinte*¹⁰¹.

It is worth to analyze this Supreme Court's decision, since Belgian *astreinte* presents certain similarities to the Anglo-Saxon punitive damages. Thus, the outcome of this judgement might be an opportunity to consider a possible compatibility of punitive damages with the Italian juridical system.

The facts of the case related to the opposition to execute in Italy an order, issued by a Belgian judge, condemning to pay an amount calculated in relation to the delay to hand over the shares of an Italian-Belgian company to the sequestrator. In particular, by condemning the defendant to hand over the shares to the sequestrator nominated by the Belgian

⁹⁹ See *supra* §3.1 (a).

¹⁰⁰ For example, with a decision of December 1st, 2010, the French *Cour de Cassation* has stated that punitive damages are consistent with the public order, as long as their amount is proportionate to the prejudice actually suffered by the victim. Moreover, see P. PARDOLESI, *La Cassazione, I danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!*, in *Corriere giuridico*, 8-9, 2012, p. 1074, according to which «l'interprete italiano potrebbe accostarsi con minor diffidenza all'istituto (e, più in generale, ai risarcimenti di matrice punitivo/sanzionatoria), con la prospettiva di misurarsi, senza alcun tipo di pregiudizio, con il riconoscimento di decisioni straniere [...]».

¹⁰¹ Cass. Civ. 15th April 2015, n. 7613, in *Foro it.*, 2015, I, p. 3951 f.

Tribunal, the Belgian judge provided for an amount of money for every day of delay¹⁰².

The Court of Appeal of Palermo rejected the opposition and the Supreme Court confirmed this decision, establishing that «the order to condemn to pay *astreinte* is not contrary to the Italian public order, since in our juridical system article 614 bis c.p.c., introduced by Law n. 69 of 2009, article 49, provides for an analogous remedy».

The Supreme Court focused again on the relation between tort law and punitive damages and on the possible functions of Italian tort law.

As regard to the relation between tort law and punitive damages, it has been argued that punitive damages coincide with *astreinte* and, as a consequence, they cannot be accepted in the Italian juridical system.

In this respect, the Supreme Court stated that there are fundamental divergences, since *astreinte* does not compensate the damage to who suffered it but threatens a damage towards who will act adversely. Thus, both punitive damages and *astreinte* target the fulfillment of the obligations, however, *astreinte* merely threatens an adverse consequence against the possible wrongdoer. This is the reason why punitive damages and *astreinte* are different remedies, and, thus, the Anglo-Saxon remedy continues to be contrary to the Italian public order¹⁰³.

Furthermore, as regard to the functions of Italian tort law, the Supreme Court showed an open attitude, by stating that tort law, whose primary purpose is to restore the prejudice suffered by the victim, pursues also

¹⁰² The Belgian judge applied article 1385 bis, *Code judiciaire*, according to which «*le juge peut, à la demande d'une partie, condamner l'autre partie, pour le cas où il ne serait pas satisfait à la condamnation principia, au paiement d'une somme d'argent, dénommée astreinte, le tout sans prejudice des dommages-intérêts, s'il y a lieu*».

¹⁰³ See A. VENCHIARUTTI, *Le astreintes sono compatibili con l'ordine pubblico interno. E I punitive damages?*, in *Resp. Civ. Prev.*, 6, 2015, pp. 1905-1906, according to which, since the French *Cour de Cassation*, the Spanish *Tribunal Supremo* and the Court of Justice of the European Union has stated that punitive damages are not contrary to the public order, the assertion that the Italian public order is a general limit to the recognition of punitive damages is merely a prejudice. Instead, the possibility to execute a judgement which awards punitive damages shall focus on the amount of punitive damages awarded by the foreign judge.

other objectives, such as deterrence and sanction¹⁰⁴. Thus, there is a growing tendency, as demonstrated also by other case-law¹⁰⁵, to increase the amount of compensation, by connecting it to the enrichment achieved by the wrongdoer¹⁰⁶.

3.4 Corte di Cassazione 5 July 2017, n. 16601

«In the Italian juridical system, tort law is not given exclusively the task to restore (*sfera patrimoniale*) of the subject that suffered the injury, since it pursues punitive and deterrent functions as well, thus, punitive damages are not ontologically incompatible with the Italian juridical system. However, the *exequatur* of a foreign judgement awarding punitive damages is subject to the condition that it has been issued in a juridical system that guarantees the principle of legality and provides for limits as regard the amount, having only regard to the effects of the foreign act and to their compatibility with the public order»¹⁰⁷.

¹⁰⁴ Whilst, as seen in the previous sections, the Supreme Court has always stated that Italian tort law pursues exclusively a compensatory function.

¹⁰⁵ Moreover, see Cass. Civ. Sez. Un., 6th May 2015, n. 9100, in *Giur. It.*, 6, 2015, p. 1413 f., in which the Court, as regard the directors' liability in case of failure/bankruptcy of the company towards corporate creditors, has stated that, wherever there is an express legal norm, tort law may pursue also a punitive function. Furthermore, see Trib. Torre Annunziata, 14th May 2000, in *Danno e Resp.*, 2000, p. 1123 f., the Tribunal, in a case of *resistenza temeraria in giudizio* by an insurance company, has stated that, if the plaintiff has proved to have consulted the insurance company, but the latter has failed to take action in order to conclude the dispute out-of-court, an amount by way of punitive damages has to be awarded to the plaintiff, to be consistent with article 96 c.p.c.

¹⁰⁶ See G. PONZANELLI, *I danni punitivi*, cit., p. 25 f., according to which, since the principle of overall compensation admits the possibility that the law fixes the compensation by less than the actual harm suffered by the victim, it should be constitutionally admitted fixing the compensation by more than the actual harm. On the contrary, see A. MENDOLA, *Astreinte e danni punitivi*, in *Giur. It.*, 2016, p. 571, according to which the Italian juridical system should not admit forms of overcompensation, since it aims to restore the prejudice suffered. In fact, article 1223, c.c., connects the damages exclusively to the losses (*patrimoniali*) and, thus, the enrichment of the wrongdoer is irrelevant.

¹⁰⁷ Cass. Civ. Sez. Un., 5th July 2017, n. 16601, in *Danno e responsabilità*, 2017, p. 419 f., which stated the following principle: «Nel vigente ordinamento, alla responsabilità

This is how *Sezioni Unite* answered to the order (*ordinanza interlocutoria*) referred to by the First Chamber (*Prima Sezione*) of *Corte di Cassazione*¹⁰⁸.

The First Chamber has, in fact, asked for the intervention of *Sezioni Unite*, as regard to a possible contrast to the Italian public order of foreign judgements awarding punitive damages.

As seen from the principle stated by the Court, the outcome is completely different from the first decisions¹⁰⁹, in which the Supreme Court had stated that foreign judgements awarding punitive damages are

civile non è assegnato solo il compito di restaurare la sfera patrimoniale del soggetto che ha subito la lesione, poiché sono interne al sistema la funzione di deterrenza e quella sanzionatoria del responsabile civile, sicché non è ontologicamente incompatibile con l'ordinamento italiano l'istituto, di origine statunitense, dei risarcimenti punitivi. Il riconoscimento di una sentenza straniera che contenga una pronuncia di tal genere deve, però, corrispondere alla condizione che essa sia stata resa nell'ordinamento straniero su basi normative che garantiscano la tipicità delle ipotesi di condanna, la prevedibilità della stessa ed i suoi limiti quantitativi, dovendosi avere riguardo, in sede di delibazione, unicamente agli effetti dell'atto straniero ed alla loro compatibilità con l'ordine pubblico».

¹⁰⁸ The case concerned an American biker, victim of a road accident, who suffered serious personal injuries, due to a defect of the helmet, which has been produced by an Italian company, AXO Sport, and resold by the American company, NOSA. The latter, on the basis of a settlement agreement (*accordo transattivo*), brings an action before the American Court, in order to condemn AXO to pay the total cost, also by way of punitive damages. Subsequently, NOSA applies the Venice Court of Appeal in order to obtain the *exequatur* of the American judgement. Even though, the Venice Court rejected the existence of a violation of the Italian public order, alleged by AXO, by sustaining that the amount provided for in the settlement agreement did not constitute punitive damages, the issue of the execution of a foreign judgement was considered of “utmost importance” and, consequently, referred to *Sezioni Unite*.

For a commentary, see C. SCOGNAMIGLIO, *I danni punitivi e le funzioni della responsabilità civile*, in *Corriere Giuridico*, 7, 2016, pp. 912-920; M. GAGLIARDI, *Uno spiraglio per i danni punitivi: ammissibile una sfumatura sanzionatoria nel sistema di responsabilità civile*, in *NGCC*, 10, 2016, pp. 1289-1294; P.G. MONATERI, *La deliberalità delle sentenze straniere comminatorie di danni punitivi finalmente al vaglio delle Sezioni Unite*, in *Danno e responsabilità*, 8-9, 2016, pp. 831-838; C. DE MENECH, *Verso la decisione delle Sezioni Unite sulla questione dei danni punitivi tra ostacoli apparenti e reali criticità*, in *Resp. Civ. prev.*, 3, 2007, pp. 986-1001.

¹⁰⁹ Cass., Sez. III, 17th January 2007, n. 1183, in *Foro it.*, 2007, I, 1460; Cass., Sez. I, 8th February 2012, n. 1781, in *Foro it.*, 2012, 5 p. 1454 f.

not compatible with the Italian public order, since the exclusive task of tort law is compensation, whilst deterrence and punishment are alien.

The reasons why the Supreme Court decided to change its approach are, fundamentally, three: (i) the different notion of public order, (ii) the changes introduced as regard to punitive damages and, (iii) the changes introduced as regard to the nature and functions of Italian tort law¹¹⁰.

As regard to the first reason, *Sezioni Unite* stated that public order does not constitute anymore the complex of fundamental principles that characterizes a national community in a specific historical period¹¹¹, but it coincides with the fundamental principles derived from the Constitution, the Founding Treaties of the European Union, the Charter of Fundamental Rights of the European Union and, indirectly, the European Convention on Human Rights¹¹².

It follows that the public order impedes the enforcement in Italy of a foreign judgement only when it contrast with the fundamental principles derived from the Constitution and, more in general, with the values aimed to protect the fundamental rights of individuals resulting from the supranational order¹¹³.

As regard to the changes introduced concerning punitive damages, now this remedy complies with the principle of proportionality and legality. In fact, starting from the famous case of 1996, *Gore v. BMW*, punitive damages must comply with the due process clause, provided for in the VIII Amendment. Thus, the Anglo-Saxon remedy is guaranteed also by

¹¹⁰ See G. PONZANELLI, *Polifunzionalità tra diritto internazionale privato e diritto privato*, in *Danno e responsabilità*, 4, 2017, pp. 435-437.

¹¹¹ Cass. 1680/1984.

¹¹² European Union law excludes the recognition of foreign judgements only in the case in which they are «manifestly contrary to public policy in the Member State in which recognition is sought», according to article 34 (1) of the Regulation 44/2001.

¹¹³ See G. CORSI, *Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di punitive damages*, in *Danno e responsabilità*, 4, 2017, p. 431, according to which the judge will deny the *exauctor* only when there is a permanent contrast of the foreign norm to the entire regulatory framework. Moreover, see G. PONZANELLI, *Polifunzionalità tra diritto internazionale privato e diritto privato*, in *Danno e responsabilità*, cit., according to which «questa ristretta nozione di ordine pubblico rende evidentemente meno severo il riconoscimento di sentenze straniere, e questo costituisce il primo tassello del revirement giurisprudenziale del luglio 2017».

the Federal Constitution and American judges have shown a much more restrictive attitude when awarding punitive damages¹¹⁴.

Finally, by referring to the changes introduced as regard to the nature and function of Italian tort law, *Sezioni Unite* abandoned the “monofunctionality” of tort law and embraced a “polifunctional” nature, thus, comprising punitive and deterrent functions¹¹⁵.

Moreover, the Supreme Court, by remembering the previous judgement n. 9100 of 2015 in which *Sezioni Unite* themselves highlighted that the punitive function of tort law is not incompatible anymore with the general principles of the Italian juridical system¹¹⁶, considered that the polifunctional nature of tort law is confirmed also by the recent activity of the legislator, which has introduced remedies compatible with the Anglo-Saxon punitive damages¹¹⁷. However, according to the Supreme Court, such punitive purpose is admissible in so far as there is a legal norm that provides for it, otherwise there would be an infringement of articles 25, clause 2, of the Italian Constitution and of article 7 of the European Convention on Human Rights (ECHR).

In fact, *Sezioni Unite*, even if they remembered their previous judgement¹¹⁸, in which it has been stated that the national legislator has the possibility to provide for punitive damages as a remedy against violations of European Union law, clarified that the punitive and deterrent function of tort law does not allow judges to increase the *quantum* of damages awarded. This is because there is a limit in article 23 of the Constitution (related to articles 24 and 25), according to which

¹¹⁴ See G. PONZANELLI, *supra* note 114, according to which, «si è passati ad una lettura costituzionale dei danni punitivi che ha ormai scacciato la prospettiva di danni cosiddetti grossly excessive».

¹¹⁵ G. PONZANELLI, *Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno*, in *NGCC*, 10, 2017, p. 1414, according to which the polifunctional nature of tort law is flawless, since it realizes an effective legal protection in the best way possible.

¹¹⁶ Arguments in favor of the “polifunctionality” of tort law can be found also in many judgements of the Italian Constitutional Court (303/2011, 238/2014, 152/2016).

¹¹⁷ Such as, art. 96, c.p.c., art. 709-ter, c.p.c., art. 158, L. n. 633/1941 (*Legge sul diritto d'autore*) and art. 125 of Law Decree n. 30/2005 (*Codice della proprietà industriale*).

¹¹⁸ Cass. Sez. Un, n. 5072/2016.

«no obligations of a personal or a financial nature may be imposed on any person except by law»¹¹⁹.

Finally, *Sezioni Unite* focused on the conditions that the foreign judgement must have, so that it does not conflict with the fundamental principles of tort law. It is of utmost importance that the foreign judge issues a decision on the basis of a legal norm that guarantees the principle of legality. Thus, there must be a legal norm that has regulated the subject and has applied principles that do not contrast with the Italian fundamental values, such as the principle of proportionality guaranteed also by article 49, clause 3, of the Charter of Fundamental Rights of the European Union. Furthermore, the legal norm must provide for limits as regard to the amount of punitive damages to be awarded¹²⁰.

To conclude, the Constitution and the legal traditions still constitute a “breathing limit” against foreign remedies. However, thanks to the last judgement of *Sezioni Unite*, punitive damages are not anymore in complete contradiction with the Italian juridical system.

4. Future prospects

The last decision of *Corte di Cassazione* broke the settled case-law, according to which punishment and deterrence are alien to the system of tort law and, thus, punitive damages are not compatible with the Italian juridical system.

The Supreme Court has now followed the approach of dominant legal scholars and has finally stated that punishment and deterrence are internal to the system of tort law and that punitive damages are compatible with the Italian regulatory framework.

¹¹⁹ See G. PONZANELLI, *I danni punitivi*, cit., according to which without a legal norm that provides for a punitive function of tort law the general principle that applies is and will always be the principle of overall compensation (*principio di integrale riparazione*).

¹²⁰ See M. GRONDONA, *Le direzioni della responsabilità civile tra ordine pubblico e punitive damages*, in *NGCC*, 10, 2017, p. 1398, according to which, the principle of correlation (*principio di tipicità*) and the foreseeability of the *quantum* relate to the principle of certainty, to be understood as meaning to prohibit an arbitrary application of legal remedies as to avoid the possibility of foreseeing the outcome of the decision.

However, the Supreme Court has highlighted that the recognition of foreign judgements awarding punitive damages is not equal to the recognition of punitive damages¹²¹.

Nonetheless, the continuous evolution of the legal reality and of the needs of individual protection, regarding also to the changes of ethical and social values, and the fact that an increasing internationalization of juridical and social relations has rendered the common law and civil law systems much more intertwined do not make so unlikely a future revolution of the Italian Supreme Court, by allowing the entrance of punitive damages in Italy.

¹²¹ In this sense, see G. PONZANELLI, *Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno*, cit., according to which in Italy the award of damages is the highest in Europe and it should not be increased, since this will lead to a rise of insurance premiums, that are, as well, the highest in Europe.

CHAPTER II: Punitive Damages in the Common Law and Civil Law Traditions

TABLE OF CONTENTS: 1. Common Law Perspective. – 1.1 England. – 1.2 United States of America. – 2. Civil Law Perspective. – 2.1 Germany. – 2.2 France.

1. Common Law Perspective

Punitive damages have long formed the jurisprudence of common law jurisdictions. However, there is no uniform practice among the major common law countries (United States of America, Canada, England and Australia) as regard to the purposes that punitive damages serve, the actions in which they may be awarded, and the factors considered in determining the amount of punitive damages awards. Nonetheless, what is undoubtedly is that punitive damages are traced back to England. Thus, it is worth to analyze how this particular remedy has developed in the English traditions and how it differs from the discipline of punitive damages in the United States, where it has been documented the most widespread use of such remedy.

1.1 England

As said in the first chapter, the history of punitive damages is rooted in 18th century English case law¹²², particularly in *Wilkes v. Wood* and

¹²² See B. RABOIN, *Punish the Crown, but Protect the Government: A Comparative Analysis of State Tort Liability for Exemplary Damages in England and Punitive Damages in the United States*, 24 *Cardozo J. Int'l & Comp. L.*, 2016, p. 264 f., according to which, in the original Saxon system, since courts did not distinguish between criminal and civil remedies, all injuries were compensated through monetary payments aiming to compensate the victim as well as to punish the offender. However, because of the increasing applicability of this system to different kinds of legal harms, the compensation scheme became more troublesome, and it was, then, replaced by an amercement system following the Norman conquests. Moreover, see K. M. ZITZER, *Punitive Damages: A Cat's Claw in Modern Civil Law*, 22 *J. Marshall L. Rev.*, 1993, p. 661 f., according to which the amercement was a monetary remedy whereby both the wrongdoer and the victim were punished and compensated by a single monetary

Huckle v. Money decisions¹²³, in which it has been asserted that tort law aims both to compensate the victim for the harm suffered and to punish the *contra ius* behavior of the wrongdoer.

Common lawyers have ascertained that the punitive function of tort law was needed in order to offset the limits of tort law, having only a compensatory function¹²⁴. In fact, according to the purely compensatory function of tort law, only a certain, precise and determinable damage can be compensated. However, this does not always happen, especially with regard to intangible losses, whereby in certain cases even the determination of the harm suffered is extremely hard to prove¹²⁵.

For those reasons, a *contra ius* behavior which harmed other individuals, irrespective of an economic loss, was considered as a sufficient condition for sanctioning the wrongdoer.

However, even if punitive damages are also aimed to guarantee the public order, by reducing individual *contra ius* behaviors, English

award, determined and administered by the Crown. In fact, the wrongdoer was protected from the victim and the victim's relatives, who might seek revenge for the harm inflicted. However, when the English common law began to make a distinction between criminal and civil remedies, the amercement system was replaced by criminal fines and civil compensatory remedies.

¹²³ For an analysis of such judgements see *supra* Chapter 1 §1.

¹²⁴ See LAW COMMISSION, *Aggravated, Exemplary and Restitutionary Damages. A consultation paper, no 132*, London, p. 2, according to which in «two categories of case there is an obvious difficulty in applying the principle of compensatory damages. Where the damages caused is financial, or readily expressed in money terms, for instance loss of earnings or damage property, the view that compensatory principles occupy a position of paramount or exclusively causes no difficulty. But there are cases in which it is impossible to quantify the damage suffered as a precise sum of money. The law of obligations protects many interests such as a bereavement, pain and suffering, personal liberty and reputation in respect of which it is either difficult or impossible to determine a monetary equivalent. Another difficulty for compensatory view of damages consist of those cases where interests, such as property, are protected without proof of damage of loss».

¹²⁵ See LAW COMMISSION, *Aggravated, Exemplary and Restitutionary Damages*, cit., p. 20, according to which «in the case of personality rights freedom from harm is not the primary or only concern, and the infringement of the right is in itself objectionable. For this reason, an award of damages may look more like vindication or punishment than compensation. Hence is not merely the nature of the loss but the nature of the interest infringement which leads to uncertainty as to the function which damages may be serving in these cases».

lawyers were fully aware of the limits and risks of such remedy. In fact, punitive damages might adversely affect both the society and the economy. Thus, since punitive damages are a remedy between civil law and criminal law, they could generate confusion for the society, whereas the distinction between the two branches of law must be clear, precise and definite¹²⁶.

Moreover, it has been argued that punitive damages could be seen as an obstacle to the public economy. In fact, in the determination of the amount of punitive damages, juries did not apply predetermined criteria, but the *quantum* was decided on a case-by-case basis. Thus, the defendant had no chance to quantify *a priori* the potential amount of damages to be paid.

This situation risked to affect in particular producers placing on the market innovative products, who had an high percentage to cause damages to consumers, by, thus, slowing down the economy.

For those reasons, many English scholars called for a revision of the punitive damages remedy. Accordingly, English tort law should have aimed exclusively to compensate the victim of the harm suffered, whilst the punitive function should have been only a prerogative of criminal law¹²⁷. The consequence of this was that punitive damages should have been removed from the English juridical system or, at least, traced back to criminal law.

¹²⁶ See D. DE LUCA, *Luci e ombre sul possibile recepimento dei danni punitivi nell'ordinamento giuridico italiano*, *Rassegna di diritto civile*, II, 2014, p. 523, according to which «la commistione delle due branche giuridiche avrebbe determinato l'insorgenza non solo di problematiche prettamente dogmatiche ma altresì processuali quali ad es le garanzie legittimamente riconosciute ai singoli consociati. In un processo improntato alle regole civilistiche ma sostanzialmente avente ad oggetto l'imposizione di una sanzione, i privati non potevano usufruire dei medesimi strumenti di tutela per tradizione caratterizzanti il processo penale, essendo quello civile privo dello strumentario giuridico necessario a tal fine. Inoltre, è stato evidenziato che riconoscere all'attore punitive damages, il cui ammontare era oltremodo elevato, gli avrebbe attribuito un vantaggio economico sostanzialmente privo di qualsiasi giustificazione logico-giuridica, con un suo arricchimento ingiustificato».

¹²⁷ See LAW COMMISSION, *Aggravated, Exemplary and Restitutionary Damages*, cit., according to which «punishment is not a legitimate function of the law of civil wrongs and should take place only within the context of the criminal law».

In view of such criticism, many scholars have argued that exemplary damages had the power to overcome the limits of both tort law and criminal law. In fact, thanks to punitive damages, an individual could have the chance to receive protection in case of intangible losses, which are not punished under English criminal law. Moreover, punitive damages would guarantee the respect of the public order, by showing the society that it is not permitted to infringe the law and, at the same time, to go unpunished¹²⁸.

However, those scholars also believe that if an individual has been punished according to criminal law, punitive damages cannot be awarded, in order to avoid a violation of the *ne bis in idem* principle.

Those different and competing views have been implemented in the 1964 leading case *Rookes v. Barnard*¹²⁹, in which, after having drawn a distinction between punitive damages and aggravated damages¹³⁰, precise and determined limits have been imposed to punitive damages.

In *Rookes*, a former union worker sued a trade union for tortious intimidation after being forced to resign from his position with a local shipbuilding company. The jury awarded the plaintiff £7,500 in punitive

¹²⁸ See E. TAYLOR, *Vicarious Punishment: An Employer's Vicarious Liability for Exemplary Damages*, *King's student L. Rev.*, 2009, p. 2, according to which tort law must pursue not only a compensatory function, but also a function of vindication. And «this “vindication” is achieved through two interlinked punitive aims: (1) punishing the tortfeasor, and, via this punishment, (2) deterring the tort or and others from committing such acts in the future by promoting respect for the law».

¹²⁹ See *Rookes v. Barnard*, *1 All England Law Reports* 367, 1964.

¹³⁰ Lord Devlin explained that punitive damages must be distinguished from the category of aggravated damages, «in which injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied». While exemplary damages had a punitive element, aggravated damages, in contrast, compensated the defendant for the aggravated nature of the defendant's conduct. Lord Devlin, then, declared: «This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject». However, the distinction between the exemplary and aggravated damages is not always clear. See H. MCGREGOR, *McGregor on Damages*, London, 1980, which noted that «aggravated damage indicates that the loss to the plaintiff is increased and can therefore only have reference, or lead on, to compensatory damages; but aggravated damages is ambiguous in this respect and could refer equally to compensatory damages and to exemplary damages».

damages, but the Court of Appeal reversed, ruling that the union had not committed any tort. The House of Lords held that the judgement on liability should be restored, but ordered a new trial on the question of damages.

Speaking for their lordships on the issue of punitive damages, Lord Devlin explained that exemplary damages are an "anomaly", appropriate in only three particular circumstances ("the categories test"): (1) oppressive, arbitrary, or unconstitutional actions by servants of the government¹³¹; (2) conduct calculated by the defendant to make a profit for himself that may well exceed the compensation payable to the plaintiff; and (3) actions where punitive damages are authorized by statute.

Under the first category¹³², a case must meet two requirements. First of all, there must have been an act that is oppressive, arbitrary, or

¹³¹ See *Rookes v. Barnard*, cit., p. 408, per Lord Devlin: «where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages».

¹³² See S. K. BUN, *Exemplary or Punitive Damages*, *Sing. J. Legal Stud.* 63, 1998, p. 66, according to which «the exception based on arbitrary, oppressive or unconstitutional actions of servants of the State may seem archaic in any society with public accountability and a developed system of administrative law. One view is that this exception serves no purpose today because there are now other checks and controls. The typical case where this will be invoked in England today will usually involve police officers who are accused of wrongful imprisonment, assault, and even the fabrication of evidence in order to secure a conviction. If any of these were to be the case, there would be every reason for a strong response. However, it is questionable whether this should be in the form of punitive damages against the State. Large awards are usually beyond the means of the rogue officers involved, and the damages will usually be borne by the State. Substantial punitive damages against the police may mean less money will be available for fighting crime. The most appropriate response would be in the form of criminal or disciplinary proceedings against those involved».

unconstitutional¹³³. In this respect, in *Holden v. Chief Constable of Lancashire*¹³⁴ the Court of Appeal focused on the use of the preposition “or” in the terms and noted that these terms are to be read disjunctively¹³⁵. As a consequence, it may be possible to fall within the first category even if the unconstitutional action was neither oppressive nor arbitrary.

Secondly, the act must have been committed by one exercising government powers¹³⁶.

With regard to the second category, Lord Devlin, who founded it on a sequence of cases beginning with *Bell v. Midland Railway Co.*¹³⁷, *Williams v. Currie*¹³⁸ and *Crouch v. Great Northern Railway*¹³⁹, explained that: «this category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object [...] which either he could not obtain at all or not obtain except at a price greater than he wants to put

¹³³ See *Watkins v. Secretary of State for the Home Department and Others*, *United Kingdom House of Lords (UKHL)* 395, 2006, in which the House of Lords established that breach of a “constitutional right” does not automatically expose the defendant tortfeasor to liability for punitive damages. An actionable tort must first be made out and this may require physical, mental or financial damage.

¹³⁴ *Holden v. Chief Constable of Lancashire*, *Queen’s Bench (QB)* 380, 1986.

¹³⁵ The facts were that the claimant was arrested and detained for 20 minutes by a member of the defendant’s police force and sought damages for wrongful arrest. The judge withdrew consideration of the question of exemplary damages from the jury on the ground that there was no suggestion of oppressive behavior on the part of the police. However, the Court of Appeal ruled that as false imprisonment was unconstitutional, the wrongful arrest by a police officer fell within the first category, regardless of the absence of oppressive behavior.

¹³⁶ The House of Lords, in *Cassell & Co, Ltd. v. Broome*, stated that the first category is to be broadly construed to include conduct by the police, municipal officers and other officials. Moreover, see V. WILCOX, *Punitive Damages in England*, in *Punitive Damages: Common Law and Civil Law perspectives*, H. KOZIOL – V. WILCOX (eds.), 2009, p. 11, according to which Lord Devlin in *Rookes* was not in favor of extending the first category to comparable conduct on the part of private individuals or corporations. As a result, in *Rookes*, the defendants, who were trade union officials, did not qualify as “servant of the government”.

¹³⁷ *Bell v. Midland Railway Co.*, *10 Common Bench Reports, New Series (CBNS)* 287, 1861.

¹³⁸ *Williams v. Currie*, *1 Common Bench Reports (CB)* 841, 1845.

¹³⁹ *Crouch v. Great Northern Railway*, *11 Exchequer Reports (Exch.)* 742, 1856.

down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay»¹⁴⁰.

Moreover, in *Cassell & Co, Ltd. v. Broome*¹⁴¹, the House of Lords clarified this category, affirming that there must exist: (1) knowledge that the proposed action is against the law or reckless disregard for whether the proposed action is illegal or legal; and (2) a decision to carry on with the proposed action because the prospects of material advantage outweigh the prospects of material loss¹⁴².

Finally, under the third category, Lord Devlin in *Rookes* thought that punitive damages could properly be awarded in instances foreseen by parliament. However, because few statutes include an authorization for punitive damages, such claims are extremely rare¹⁴³.

Almost thirty years after the decision in *Rookes v. Barnard*, in *AB v. South West Water Services Ltd.*¹⁴⁴, the Court of Appeal greatly limited the types of cases in which punitive damages may be recovered, by

¹⁴⁰ See *Rookes v. Barnard*, cit., p. 410 f., according to which «where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity».

¹⁴¹ *Cassell & Co, Ltd. v. Broome*, A.C. 1027 (H.L.), 1972.

¹⁴² See J.Y. GOTANDA, *Punitive Damages: A Comparative Analysis*, 42 *Colum. J. Transnat'l L.* 391, 2004, p. 400, according to which this category includes cases such as libel, trespass and other malicious and illegal acts.

¹⁴³ An example of statute which authorizes such an award is the Reserve and Auxiliary Forces (Protection of Civil Interests) Act. The Act protects individuals who serve in the armed forces by restricting the enforcement of various civil judgements against them, except with the leave of an appropriate court. It provides that «in any action for damages for conversion or other proceedings which lie by virtue of any such omission, failure or contravention, the court may take account of the conduct of the defendant with a view, if the court thinks fit, to awarding exemplary damages in respect of the wrong sustained by the plaintiff».

¹⁴⁴ *AB v. South West Water Services Ltd.*, *Queen's Bench (QB)* 507, 1993. The case concerned a man who fell ill after drinking contaminated water from the defendant. The water had been accidentally polluted with aluminum sulphate. The plaintiff claimed damages, including aggravated and punitive damages, for breach of common law and statutory duties, strict liability, breach of contract, negligence and nuisance. The defendant admitted liability for compensatory damages but sought to strike the claims for punitive and aggravated damages. The trial judge refused to do so, and the defendant appealed.

introducing the “cause of action test”. It was said that the combined effect of *Rookes v. Barnard* and conclusions to be drawn from the majority of speeches in *Cassell & Co. Ltd. v. Broome* was that the claim must be limited to torts (or causes of action) in respect of which it could be established that there had been an award of exemplary damages prior to 1964¹⁴⁵.

As a consequence, the decision in *AB* limited the first category to the torts of malicious prosecution, false imprisonment, assault and battery. In addition, it limited the second category primarily to cases of defamation, trespass to land and tortious interference with business. Thus, punitive damages became unavailable in suits based on negligence, public nuisance, breach of European Community law, patent infringement, as well as unlawful discrimination based on sex, race or disability¹⁴⁶.

However, the limitations imposed by the “cause of action test” were subsequently rejected in 2001, in *Kuddus v. Chief Constable of Leicestershire Constabulary*¹⁴⁷.

The House of Lords held that the availability of punitive damages should not be limited solely to those causes of action for which such damages were available prior to 1964, by considering such requirement as irrational. In this respect, Lord Slynn explained that «such a rigid rule

¹⁴⁵ Which is the date of *Rookes v. Barnard*.

¹⁴⁶ See S. K. BUN, *Exemplary or Punitive Damages*, op. cit., p. 67, according to which « it is not enough to show that the defendant had calculated to profit from his tort even after paying damages. It must also be shown that prior to *Rookes*, punitive damages had been awarded for the commission of such a tort. If this qualification is accepted, then any tort which was unknown prior to *Rookes* can never result in punitive damages even if the conduct in question is far more reprehensible than a tort for which punitive damages had been awarded before». However, *Rookes* declared that some cases which seemed to award punitive damages were actually cases of aggravated damages. Thus, there is also the problem of interpreting pre-1964 case law, to see if they are really cases of punitive damages, rather than of aggravated damages.

¹⁴⁷ *Kuddus v. Chief Constable of Leicestershire Constabulary*, 2 *Appeal Cases (AC)* 122, 2002. In this case, the plaintiff brought an action against a police constable for misfeasance of office and sought, *inter alia*, punitive damages. The judge struck the claim for punitive damages on the ground that the misfeasance of office was not a cause of action for which punitive damages were awarded prior to 1964. The Court of Appeal affirmed this decision and, thus, the plaintiff appealed to the House of Lords.

seems to me to limit the future development of the law even within the restrictive categories adopted by Lord Devlin [in *Rookes*] in a way which is contrary to the normal practice of the courts [...] ».

Thus, in order to determine whether a case allows for punitive damages, the focus should be on whether the circumstances in which the tort is committed bring it within one of the three categories allowing for these damages, and not on the cause of action.

However, even if the decision in *Kuddus* significantly broadened the types of actions in which punitive damages may be awarded, there are still several important limitations which further restrict the availability of punitive damages in England and should always be borne in mind when awards of punitive damages are being considered.

The first one is the “if, but only if” test, according to which a court can award punitive damages only if compensatory damages are inadequate to punish the defendant, deter others, and mark the court’s disapproval of such conduct¹⁴⁸.

According to the second limitation, a claimant cannot recover punitive damages unless he is the victim of the punishable behavior¹⁴⁹.

The third one is that judges and juries must adhere to the principle of moderation, according to which an award of punitive damages should be the minimum necessary to meet the public purposes of punishment and deterrence underlying such damages¹⁵⁰. Furthermore, punitive damages may not be appropriate if the defendant has already been punished for the wrongful conduct through the imposition of a criminal sanction or

¹⁴⁸ See *Rookes v. Barnard*, cit., in which Lord Devlin stated that: «in a case in which exemplary damages are appropriate, a jury should be dictated that *if, but only if*, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum».

¹⁴⁹ See Lord Devlin in *Rookes v. Barnard*, in which he stated that: «the anomaly inherent in exemplary damages would become an absurdity if the claimant, totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence».

¹⁵⁰ See V. WILCOX, op. cit., in *Punitive Damages: Common Law and Civil Law perspectives*, H. KOZIOL – V. WILCOX (eds.), 2009, p. 25, according to which «this is so as the power to award exemplary damages constitutes a weapon and while it can be used in defence of liberty, it can also be used against liberty».

disciplinary proceedings¹⁵¹. According to the fifth limitation, the existence of multiple plaintiff's may limit the availability of punitive damages¹⁵². Moreover, the good faith of the defendant has been regarded as a bar to the award of punitive damages, or, at least, as a factor which reduces the award¹⁵³. Finally, if the plaintiff caused or contributed to the behavior complained of, his action may prevent an award of punitive damages¹⁵⁴.

Finally, as regard to the amount of punitive damages, in England excessive awards of punitive damages are prohibited. Thus, the Court of Appeal in *Thompson v. Commissioner of Police of the Metropolis* issued precise guideline for juries in determining the appropriate amount of punitive damages. In particular, the court stated that awards of punitive damages are unlikely to be less than £5,000 and that £50,000 should be regarded as the absolute maximum¹⁵⁵. Furthermore, it specified that it

¹⁵¹ This limitation is based on the principle, according to which no one should be punished twice for the same conduct (*ne bis in idem* principle).

¹⁵² See *Riches v. News Group Newspapers, Queen's Bench (QB) 256*, 1986, in which the court identified the direction to be followed: (a) aggregate the amount of compensatory damages to be awarded to each claimant; (b) if that sum is an insufficient penalty, then add to the total compensatory damages a sum that is sufficient, and (c) having found the total sum to be awarded, the amount of the difference between that sum and the total compensatory damages is to be divided equally between the number of claimants.

¹⁵³ See *Holden v. Chief Constable Lancashire*, cit., in which it has been stated that the absence of aggravating circumstances is an element which the jury has to consider in deciding an award of punitive damages.

¹⁵⁴ See *Thompson v. Commissioner of Police of the Metropolis, Queen's Bench (QB) 498*, 1998, in which Lord Woolf M.R. stated that «even though the plaintiff succeeds on liability, any improper conduct of which they find him guilty can reduce or even eliminate any award of exemplary damages if the jury consider that this conduct caused or contributed to the behaviour complained of».

¹⁵⁵ See *Thompson v. Commissioner of Police of the Metropolis*, cit., in which the court further stated: «the figures given will of course require adjusting in the future for inflation. We appreciate that the guideline figures depart from the figures frequently awarded by juries at the present time. However they are designed to establish some relationship between the figures awarded in this area and those awarded for personal injuries [...]. [W]e have taken into account the fact that the action is normally brought against the chief officer of police and the damages are paid out of police funds for what is usually a vicarious liability of the acts of his officers in relation to which he is a joint tortfeasor. In these circumstances it appears to us wholly inappropriate to take into

would be unusual for punitive damages to be more than three times the basic damages, except where the basic damages are modest.

In conclusion, it appears that the scope to go beyond purely compensatory damages and to award punitive damages, even if subject to certain limitations, will remain a part of English law. However, the attitude of English scholars and how punitive damages are awarded are completely different from the approach in the United States, in which punitive damages are treated as a generalized remedy at the disposal of the society.

1.2 United States of America

Even if the history of punitive damages can be traced back to England, the most widespread use of such remedy is in the United States.

Nearly thirty years after the two famous English cases, *Wilkes v. Wood* and *Huckle v. Money*, the United States incorporated the doctrine of punitive damages into its own legal system and tradition. The earliest reported punitive damages case is *Genay v. Norris*¹⁵⁶, decided by the South Carolina Supreme Court in 1784. The plaintiff received punitive damages after getting sick from drinking wine that contained poison, added by the defendant, which caused to the plaintiff «extreme and excruciating pain».

Another early case is *Coryell v. Colbaugh* of 1791, which involved a breach of a promise by the defendant to marry the plaintiff. Punitive damages were awarded in order to serve as an example to others¹⁵⁷.

Thus, during the 18th and 19th century, the American cases carried forward the idea, established in England during the 18th century, that punitive damages were designed to punish the defendant's actions which

account the means of the individual officers except where the action is brought against the individual tortfeasor».

¹⁵⁶ *Genay v. Norris*, 1 *South Carolina Law Reports (S.C.L)* 1 Bay 6, 1784.

¹⁵⁷ *Coryell v. Colbaugh*, 1 *New Jersey Law Reports (N.J.L)* 77, 1791. The jury was instructed by the court «not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future».

injured the plaintiff's honor or expressed an attitude of humiliation towards him¹⁵⁸.

By the end of the 19th century, punitive damages had become a solid «fixture of American common law¹⁵⁹».

However, even if, since the very beginning, the United States has accepted this remedy, it does not mean that punitive damages were not a controversial issue¹⁶⁰.

Scholars in support of assessing punitive damages have traditionally stated that this remedy serves to punish and deter wrongdoers from

¹⁵⁸ See D. ELLIS, *Fairness and Efficiency in the Law of Punitive Damages*, *Southern California Law Review* 56, 1982, p. 14 f., «The reported cases from roughly the first quarter of the seventeenth century through the first quarter of the nineteenth century [...] included cases of slander, seduction, assault and battery in humiliating circumstances, criminal conversion, malicious prosecution, illegal intrusion into private dwellings and seizure of private papers, trespass onto private land in an offensive manner, and false imprisonment. Diverse as they may have been, all of these cases share one common attribute: they involved acts that resulted in affronts to the honour of the victims».

¹⁵⁹ A. HARRIS, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 *ALA. L. REV.*, 1989, pp. 1079-1086; J. PERCZEK, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 *SUFFOLK U. L. REV.*, 1993, pp. 832-33.

In 1851, the Supreme Court reiterated its approval of assessing punitive damages and recognized them as «an integral part of the American justice system» (Day v. Woodworth, according to which «[a] jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff»).

¹⁶⁰ See G. PONZANELLI, *I Punitive Damages nell'esperienza nordamericana*, *Riv. Dir. Civ.*, 1983, p. 435 f.; A.J. SEBOK, *Punitive Damages in the United States*, in *Punitive Damages: Common Law and Civil Law perspectives*, H. KOZIOL – V. WILCOX (eds.), 2009, p. 161, stating that in the middle of the 19th century two of America's leading scholars, Theodore Sedgwick (a practicing lawyer and an editor) and Simon Greenleaf (Harvard's Professor) fought deeply over punitive damages: «Professor Greenleaf argued that punitive damages were a mistake because they confused public and private law functions. Thus, in his very influential Treatise on the Law of Evidence, Greenleaf categorically rejected punitive damages. Sedgwick, who wrote an equally influential treatise entitled A Treatise on the Measure of Damages, rejected Greenleaf's methods and conclusions. The law, Sedgwick argued in 1847, "permits the jury to give what in terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender" ».

carrying on activities that the society has deemed unacceptable¹⁶¹. Moreover, punitive damages have been justified as a mechanism to protect consumers from fraudulent and misleading trade practices¹⁶². On the contrary, opponents of punitive damages argue that they fail to deter some wrongdoers, since there are certain individuals who will never be deterred even when punitive damages are assessed against them¹⁶³. Furthermore, if the actions of a defendant do not constitute a crime, then there should not be an award of punitive damages through the civil law¹⁶⁴.

However, the most widely held criticism of punitive damages is that juries are given too much discretion in determining their amount. Accordingly, under the traditional approach, once it is determined that the conduct justifies an award of punitive damages, the jury determines the amount, «consider[ing] the gravity of the wrong and the need to deter

¹⁶¹ See Restatement (Second) of Torts, § 908, 1979, according to which « (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others [...] ».

¹⁶² See N. C. PRATER, *Punitive Damages in Alabama: A Proposal for Reform*, 26 *Columb. L. Rev.*, 1995-1996, p. 1035, according to which punitive damages provide consumers protection from businesses which engage in fraudulent business practices.

¹⁶³ See J.D. GHIARDI – J.J. KIRCHER, *Punitive Damages: Law and Practice*, ch. 2 § 2.07, at 15, 1985, according to which psychologists and psychiatrists are in agreement that in few cases it is impossible for some people to be deterred and, thus, the assessment of punitive damages has no effect. Moreover, in civil cases, unlike in criminal cases, there is no mechanism to isolate these people from society so that they will not continue to cause harm to society. Furthermore, it is argued that the assessment of punitive damages undermines the purpose of civil law to indemnify the plaintiff and not deter the defendant.

¹⁶⁴ L.L. SCHLUETER – K.R. REDDEN, *op.cit.*, p. 32, according to which if a person's conduct does not constitute a crime, then punitive damages should not be awarded «on an ad hoc basis». However, proponents of punitive damages respond by arguing that assessing punitive damages in civil actions reaches conduct such as «slanders, assaults, minor oppressions and cruelties» which are rarely enforced by criminal prosecutors.

similar wrongful conduct»¹⁶⁵. The jury determination is, then, reviewed by the trial judge and appellate courts.

In this respect, it is fundamental to underline that, even if a majority of states allowed for the assessment of punitive damages¹⁶⁶, many states implemented procedural reforms limiting the amount of punitive damages or enacted legislation placing statutory caps on punitive damages awards¹⁶⁷, in order to counter the practice of awarding punitive damages “grossly excessive”.

¹⁶⁵ *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 15, 1991. Commentators also note that some states permit juries to consider in determining the amount of punitive damages to be awarded: (1) the possibility of criminal punishment, (2) the amount of compensatory damages, and (3) the expense and attorneys' fees incurred by the plaintiff. See J.J. Kircher – C. Wiseman, *Punitive Damages: Law & Practice*, §§ 5:23, 5:175-77.

¹⁶⁶ Three states, Nebraska, New Hampshire, and Washington, have either prohibited or outlawed their assessment. However, even in states which allow punitive damages, in order to assess punitive damages, the conduct required of the defendant varies from state to state. Moreover, the defendant's conduct must be shown to be one of the following: (1) malice, (2) conduct exceeding gross negligence, but not requiring malice, (3) gross negligence, or (4) as defined by various statutory provisions.

¹⁶⁷ LA. CODE § 6-11-21, 1993, stating an award of punitive damages may not exceed \$250,000 unless the defendant displayed a pattern or practice of wrongful conduct, actual malice, libel, slander, or defamation; COLO. REV. STAT. § 13-21-102(1)(a)(3), 1987, stating punitive damages may not exceed actual damages unless the judge finds that the defendant either continued or aggravated the injury to the plaintiff during the trial, in which case punitive damages may not exceed three times the plaintiff's actual damages; CONN. GEN. STAT. ANN. § 52-240b, West 1997, stating that punitive damages may not exceed two times the plaintiff's actual damages in products liability suits; FLA. STAT. ANN. § 768.73(1)(a)-(b), West 1997, stating punitive damages cannot exceed three times compensatory damages without clear and convincing evidence that the award was not excessive; GA. CODE ANN. § 51-12-5.1(g), Supp. 1995, stating that punitive damages are limited to \$250,000, except in products liability suits and intentional torts); IND. CODE ANN. § 34-4-34-4, Michie 1986, stating that punitive damages are limited to three times actual damages or \$50,000, whichever is greater; KAN. STAT. ANN. § 60-3702(e)(1)-(2), 1994, stating that punitive damages limited to the lesser amount of either the defendant's adjusted gross income over the previous five years or five million dollars unless the defendant profited from the conduct in question; NEV. REV. STAT. § 42.005(a)-(e), 1981, limiting punitive damages to three times compensatory damages or \$300,000 if award is \$100,000 or less, but does not apply to insurance bad faith, products liability, defamation, drunk driving, toxic substances, or housing discrimination actions.

As regard to the approach of the American Supreme Court, for over 200 years, it has declined to place any constitutional limits¹⁶⁸ on punitive damages awarded by juries, basing its decisions on the historic recognition of punitive damages in the United States and England¹⁶⁹. However, starting from the middle of the 19th century, the Supreme Court has issued a number of decisions limiting awards of punitive damages and identifying procedures for courts to follow in reviewing such awards.

The first case to invalidate a jury award of punitive damages on the ground that it was grossly excessive and exceeded constitutional limits was *BMW of North America, Inc. v. Gore*¹⁷⁰.

¹⁶⁸ Defendants have put forth two main constitutional challenges to punitive damages awards. First, they have claimed a violation of the Excessive Fines Clause of the Eighth Amendment («Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted»). Second, defendants have challenged punitive damages as violating both procedural and substantive rights found in the Due Process Clause of the Fourteenth Amendment («[...] nor shall any State deprive any person of life, liberty, or property, without due process of law [...] »). See M.M. JOCHNER, *Punitive Damages: The United States Supreme Court's Meandering Path*, Ill. B. J., 1995, p. 580, according to which, despite the Court's willingness to address such challenges, « [t]he Court [...] has struggled with [definitively answering the constitutional implications of such awards], moving in incremental, and often confusing, steps toward formulating guidelines governing the imposition of punitive awards».

¹⁶⁹ See *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521, 1885, in which it has been stated that « [i]n England and in this country, [damages] have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of."). Moreover, see *Day v. Woodworth*, 54 U.S., 371, 1852, according to which «it is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant [...] ».

¹⁷⁰ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 1996.

However, prior to this decision, the American Supreme Court already dealt with the issue of placing constitutional limits over punitive damages. In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court faced a due process challenge to an \$840,000 punitive damages award, when only \$200,000 was awarded as compensatory damages. The defendant challenged the punitive damages award, arguing a violation of the Fourteenth Amendment. In this case, the Court held that, since the common law method of assessing punitive damages existed prior to the adoption of the Fourteenth

In this case¹⁷¹, Gore alleged that BMW committed fraud under Alabama law by failing to disclose that the new car he purchased from an authorized dealer had been damaged and repainted prior to its sale. Gore won a jury verdict of \$4,000 for compensatory damages and \$4 million

Amendment, the assessment of «punitive damages [wa]s not so inherently unfair as to deny due process and be *per se* unconstitutional». However, even if the Court was unwilling to «draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case», it acknowledged that at some point an award of punitive damages may violate a defendant's due process rights if the ratio between compensatory and punitive damages was too high. Moreover, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court, first of all, stated «that the Due Process Clause of the Fourteenth Amendment imposes substantive limits “beyond which penalties may not go” ». However, instead of developing a test for determining when a punitive damages award has to be considered as excessive, the Supreme Court reaffirmed, as in *Haslip*, that «[a] general concer[n] of reasonableness [...] enter[s] into the constitutional calculus». Thus, the Court rejected the defendant's claim, recognizing that, even if the award was extremely large (526 times the compensatory damages), the relationship between the punitive damages award and the actual harm was only one factor to be considered, as it was necessary to take into account also «the amount of money potentially at stake, [TXO's] bad faith, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and [TXO's] wealth». Therefore, the award was not “grossly excessive”. See J. ZENNETH LAGROW, *BMW of North America, Inc. v. Gore: Due Process Protection against Excessive Punitive Damages Awards*, 32 *New Eng. L. Rev.*, 1997, p. 169 f.; C.V. CARLYLE, *Big Business Beware: Punitive Damages Do Not Violate the Fourteenth Amendment According to Pacific Mutual Life Insurance Co. v Haslip*, 19 *Pepp. L. Rev.*, 1992, p. 1397 f.; A.J. SEBOK, *Punitive Damages in the United States*, cit., p. 189 f.; G. PONZANELLI, *Non c'è due senza tre: la Corte suprema USA salva ancora i danni punitivi*, *Foro it.*, IV, col. 92, 1994; G. PONZANELLI, «Punitive damages» e «due process clause»: l'intervento della Corte suprema Usa, *Foro it.*, IV, col. 235, 1991.

¹⁷¹ See J. ZENNETH LAGROW, *BMW of North America, Inc. v. Gore: Due Process Protection against Excessive Punitive Damages Awards*, cit.; A.J. SEBOK, *Punitive Damages in the United States*, cit.; J. Y. GOTANDA, *Punitive Damages: A Comparative Analysis*, cit.; B.C. ZIPURSKY, *A Theory of Punitive Damages*, 84 *Tex. L. Rev.*, 2005, pp. 105-172; M.J. CAREY, *BMW of North America v. Gore: A Misplaced Guide for Punitive Damages Awards*, 18 *N. Ill. U. L. Rev.*, 1997, pp. 219-238; D.W. MOTRON-BENTLEY, *Law, Economics, and Politics: The Untold History of the Due Process Limitation on Punitive Damages*, 17 *Roger Williams U. L. Rev.*, 2012, p. 817 f.; G. PONZANELLI, *L'incostituzionalità dei danni punitivi «grossly excessive»*, *Foro it.*, IV, col. 421, 1996; M.S. ROMANO, *Quando il troppo è troppo: verso un argine costituzionale ai danni punitivi*, *Danno e responsabilità*, 3, 1997.

in punitive damages. Subsequently, BMW appealed to the Alabama Supreme Court, which rejected its claim, holding that the award was not unconstitutionally excessive. Nevertheless, it held «that a constitutionally reasonable punitive damages award in this case is \$2,000,000» and «expressly disclaimed any reliance on “acts that occurred in other jurisdictions” ».

However, the United States Supreme Court reversed, stating that the assessment of a \$2 million punitive damages award was “grossly excessive” and constituted a violation of BMW’s substantive due process rights of the Fourteenth Amendment.

First of all, the Supreme Court hold that the inquiry to determine whether a punitive damages award is unconstitutionally excessive should begin with identifying the interests that a punitive damages award is designed to serve¹⁷². Here, the Court acknowledged that the State of Alabama had an interest in protecting its citizens by prohibiting deceptive trade practices. However, «no single State [can] impose its own policy choice on neighboring States»¹⁷³. As a result, the jury should have only considered the BMW's conduct that had an impact on Alabama citizens. Moreover, in examining the excessiveness of the punitive damages award¹⁷⁴, the Supreme Court announced three guideposts to be used in reviewing punitive damages awards: (1) the degree of reprehensibility of the defendant’s misconduct, (2) the ratio between compensatory and punitive damages, and (3) the difference between the punitive damages award and the penalties that could be imposed for similar conduct.

¹⁷² Writing for the majority, Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, and Breyer, stated «that the federal excessiveness inquiry [...] begins with an identification of the state interests that a punitive award is designed to serve».

¹⁷³ In fact, to impose economic sanctions for conduct outside the state, the Court opined, would improperly punish BMW for conduct that was lawful in other jurisdictions and that would have no effect on Alabama. Thus, the Court held that a punitive damages award must reflect the state's interest in protecting its own consumers and economy and not «conduct that was lawful where it occurred and which had no impact on Alabama or its residents».

¹⁷⁴ Justice Stevens asserted that «[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose».

For the Court, the most important indicium of reasonableness of a punitive damages award was the degree of reprehensibility of the defendant's conduct¹⁷⁵. Applying this factor, the Court determined that BMW's conduct was not sufficiently reprehensible to justify a \$2 million punitive damages award, as «none of the aggravating factors associated with particularly reprehensible conduct [were] present»¹⁷⁶.

Turning to the second guidepost, the Court noted that a punitive damages award must be «reasonabl[y] relat[ed] » to the actual harm suffered by the plaintiff. However, while it refused to adopt a simple mathematical formula to determine the constitutionality of a punitive damages award, the Court noted that the \$2 million punitive damages award against BMW was 500 times the actual harm suffered by Gore and concluded that it «surely raise[s] a suspicious judicial eyebrow».

Finally, the Supreme Court addressed the third guidepost, which concerns the difference between the punitive damages award and the «civil or criminal penalties that could be imposed for comparable misconduct».

Based on this factor, since the punitive damages award was substantially greater than any statutory fine available in Alabama or in any other state for BMW's nondisclosure policy and « [t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal», the Court held the award to be unconstitutionally excessive¹⁷⁷.

¹⁷⁵ The Court added a footnote stating that « [t]he flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages».

¹⁷⁶ In fact, the Court noted that the harm Gore suffered was purely economic, the repainting did not affect the car's performance, BMW's conduct did not threaten the safety of others, and BMW did not act in bad faith.

¹⁷⁷ Justice Scalia, joined by Justice Thomas, dissented, because they disagreed with the Court that the \$2 million award exceeded a constitutionally reasonable amount. According to J. Scalia, «since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments». Moreover, he stated that the Due Process Clause of the Fourteenth Amendment is not «a secret repository of substantive guarantees against unfairness – neither the unfairness of an excessive civil compensatory award, nor the unfairness of an unreasonable punitive award». Finally, Scalia concluded his dissent by stating that « [t]he elevation of “fairness” in punishment to a principle of “substantive

Subsequently, the Supreme Court clarified the Gore guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*¹⁷⁸.

The Supreme Court began its analysis by stating that «while States possess discretion over the imposition of punitive damages [...] [t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary» punitive damages awards because due process requires that individuals receive «fair notice not only of the conduct that will subject them to punishment, but also of the severity of the penalty that a State may impose»¹⁷⁹.

due process” means that every punitive award unreasonably imposed is unconstitutional».

¹⁷⁸ *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 2003. There, Campbell alleged that State Farm's actions in settling an insurance claim against him constituted bad faith, fraud, and intentional infliction of emotional distress. A jury awarded Campbell \$2.5 million in compensatory damages and \$145 million in punitive damages. The trial judge then reduced the damages to \$1 million in compensatory damages and \$25 million in punitive damages. Both parties appealed to the Utah Supreme Court. After purporting to apply the guidelines set forth in *Gore*, that court reinstated the \$145 million punitive damages award, stating that the jury's award did not surpass constitutional limits. The United States Supreme Court reversed. See J. ZENNETH LAGROW, *BMW of North America, Inc. v. Gore: Due Process Protection against Excessive Punitive Damages Awards*, cit.; A.J. SEBOK, *Punitive Damages in the United States*, cit.; J.R. WHITE, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. High Tech. L., 2005, pp. 79-138; L.J. EFTING, *Punitive Damages: Will the Courts Still Punish the Wrongdoer after State Farm Mutual Automobile Insurance Co. v. Campbell*, 49 S.D.L. Rev., 2003, pp. 67-103; G. PONZANELLI, *La «costituzionalizzazione» dei danni punitivi: tempi duri per gli avvocati nordamericani*, *Foro it.*, IV, col. 356, 2003; L. LANUCARA, *I danni punitivi nell'ultima rilettura della Corte Suprema: più “damages” e meno “punitive”*, *Int'l Lis*, 1, 46, 2004.

¹⁷⁹ Moreover, the Supreme Court, in addition to limiting the use of lawful out-of-state conduct in the punitive damages determination, further indicated that, as a general rule, a State does not have the right to punish a defendant for unlawful conduct that occurred beyond its jurisdictional boundaries («a basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction»). Furthermore, the Court held that conduct either within or outside Utah should have been excluded from the jury if it failed to bear a certain relation to the plaintiff's injury. In this respect, Justice Kennedy, writing for the Court, said: «for a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: the courts awarded punitive damages to punish and deter conduct that bore no *relation* to the Campbell's harm. A

Then, the Court turned to Gore's three guideposts for reviewing punitive damages awards.

As regard to the first guidepost, the Supreme Court held that the defendant's reprehensibility can be determined by looking to the following factors: (i) whether the harm caused was physical or economic, (ii) whether the defendant's conduct evinced an indifference to the safety or health of others, (iii) whether the plaintiff had financial vulnerability, (iv) whether the conduct at issue was an isolated incident or was repeatedly performed by the defendant, and (v) whether the defendant's conduct exhibited malice, trickery or deceit¹⁸⁰.

Moreover, the Court added that punitive damages should only be awarded if the compensatory damages are inadequate to punish the defendant and deter him and others from repeating it¹⁸¹.

Subsequently, the Supreme Court turned to the second guidepost and once more declined to adopt a bright line rule, indicating again that a punitive damages award must be reasonable and proportional in relation to the amount of harm and the compensatory damages recovered. However, the Court indicated that «in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process».

Applying the guidepost, the Court indicated that there was «no doubt» that the ratio was unconstitutional.

With respect to the third guidepost, the Court stated that this guidepost should not mean that punitive damages could be used as a substitute for

defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavoury individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt that Utah Supreme Court did that here».

¹⁸⁰ The Court explained that the existence of only one of these factors may not be a sufficient basis to award punitive damages and, if none of these factors were present, such an award would be constitutionally suspect.

¹⁸¹ In this situation, according to the Court, a smaller award would have as well satisfied Utah's dual goals of deterrence and retribution. In fact, Utah was punishing State Farm not only for its actions in the state, but also for its nationwide practices, which the Court specifically ruled improper in Gore.

criminal punishment, which may be imposed only after proceedings where the defendant is accorded more protections and where there exists a higher standard of proof¹⁸². Because the most relevant civil penalty under Utah law only authorized a \$10,000 fine for the act of fraud, the court held that under the third guidepost a \$145 million punitive damages award «was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant»¹⁸³.

In conclusion, the U.S. Supreme Court is deeply concerned with both the process for awarding punitive damages and the size of such awards. In fact, it has stated that due process rights require that safeguards be in place in order to ensure fairness in the awarding of punitive damages and prohibit grossly excessive awards of punitive damages.

Thus, it is likely that in the future American courts will analyze punitive damages awards more in depth, by ensuring that they are compatible with U.S. standards.

2. Civil Law Perspective

Even if the punitive damages remedy is deeply entrenched in the common law systems, this does not mean that civil law jurisdictions do not pay attention. In the first chapter we have seen the development of this civil remedy in the Italian traditions, having regard to the approach of scholars and the jurisprudence of the Italian Supreme Court. Now, it

¹⁸² The Supreme Court cautioned against using punitive damages to «assess criminal penalties that can be imposed only after the heightened protection of a criminal trial [...] including, [...] its higher standards of proof».

¹⁸³ However, three Justices dissented from the majority's opinion. Both Justice Scalia and Justice Thomas held, as they did in *Gore*, that the Due Process Clause does not provide substantive protections constraining the size of punitive damages awards. Moreover, Justice Ginsburg argued that the Court erred in limiting its reprehensibility analysis to only the specific act that harmed the Campbells and maintained that there was a sufficient "nexus" between the «other acts» evidence offered and the «specific harm suffered by [the Campbells] » to meet the Court's admissibility requirement for out-of-state conduct.

is worth to analyze how punitive damages are treated in other civil law countries, particularly in France and Germany.

2.1 Germany

Until the 19th century, in Germany there was no unanimous attitude as far as punitive damages (*Strafschadenersatz*) were concerned. Even if they were not available everywhere in the country, punitive damages were quite familiar in many German states¹⁸⁴. However, differently from the United States¹⁸⁵, in Germany the idea of a strict separation of damages in civil law and punishment in criminal law prevailed. In fact, during the legislative procedure that led to the enactment of the German Civil Code of 1900, it was argued that tort law should have the exclusive function of restoring the losses caused by the wrongful act.

Therefore, as resolved in the preparatory documents to the German Civil Code, the law of damages is strictly limited to compensate the victim, whereas punishment regards solely criminal law sanctions¹⁸⁶.

¹⁸⁴ See V. BEHR, *Punitive Damages in America and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts*, 78 *Chicago-Kent Law Rev.*, 2003, p. 127, according to which « [...] on several occasions, the Prussian Civil Code allowed the courts to award damages greater than the loss the plaintiff had suffered, measuring damages in proportion to the fault of the tortfeasor. On the other hand, the Bavarian Civil Code stated that "as meanwhile these torts are punished in criminal law," there was to be no more use of double and quadruple actions».

¹⁸⁵ In which, as seen in the previous section, the more practical approach of Theodore Sedgwick won over the more theoretical and dogmatic approach of Simon Greenleaf.

¹⁸⁶ The preparatory documents to the German Civil Code states that «Draft as to cases where damages are based on the fault of the responsible rejects the gradual system of the amount of damages according to the type or grade of fault as it is given in several codifications, namely the Prussian Civil Code. Inclusion of moral and penal points of view (into the law of damages), on which this differentiation is founded, must be kept aside in adjudicating the civil law consequences of illicit and wrongful behavior. The principle of the common law according to which the amount of damages caused delimits the amount of awardable damages from a legal point of view is acceptable and alone gives justice to the person entitled to damages».

Thus, based on these ideas, the German Civil Code was enacted, establishing a purely compensatory law of damages¹⁸⁷.

German courts and scholars, in line with this legislative history, considered punitive damages not to be a part of the German legal system and stressed the exclusivity of the compensatory function of tort law.

This idea is most often highlighted when German courts have to deal with the enforcement of U.S. punitive damages awards. Since the enforcement is only available if the result of the foreign judgement does not violate German policy and the restriction of damages to compensation is among the fundamental principles of German law, punitive damages are generally held to be contrary to German public order¹⁸⁸.

Despite this clear legislative and doctrinal framework, punitive damages have long been the subject of debate in Germany, particularly during the last 20 years.

In this respect, it is not possible to analyze punitive damages in Germany without mentioning damages for pain and suffering (*Schmerzensgeld*), since they have been «the traditional battlefield for debates on punitive damages in German law»¹⁸⁹.

¹⁸⁷ According to § 249(1) of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*), a person who is liable in damages must primarily restore the injured person or damaged property to the position that would have existed had the wrong not occurred. If the victim has suffered bodily injury or damages to his property, § 249(2) BGB allows the latter to demand the required monetary amount in lieu of restitution. Only where genuine restitution is impossible or unreasonable (for the injured party or the tortfeasor) does the tortfeasor have to make good the resulting economic loss in money instead: § 250 s.1, 251 BGB. Furthermore, monetary indemnification for non-economic loss presupposes an injury to the body or health, or an infringement of the victim's freedom or sexual self-determination, § 253 BGB.

¹⁸⁸ See N. JANSEN-L. RADEMACHER, *Punitive Damages in Germany*, in *Punitive Damages: Common Law and Civil Law perspectives*, H. KOZIOL – V. WILCOX (eds.), 2009, p. 76, according to which punitive damages raise constitutional rights concerns, too. In fact, according to article 103(2) of the German constitution, penalization is only permitted if the threat of punishment is explicitly codified and its conditions are precisely described. Moreover, an award of punitive damages against a convicted tortfeasor is seen as possibly leading to double punishment, which is prohibited pursuant to article 103(3) of the German Constitution.

¹⁸⁹ See N. JANSEN-L. RADEMACHER, *Punitive Damages in Germany*, cit., p. 77.

Similar to punitive damages during the 19th century, damages for pain and suffering were not allowed in many German states. In fact, first of all, there was the idea that pain and suffering constituted non-pecuniary loss, and that only pecuniary loss could be compensated by money¹⁹⁰. Furthermore, it was almost impossible to calculate such damages without taking into account the degree of fault of the wrongdoer, which was not a parameter that determines the amount of damages, but, instead, whether an action may lead to damages¹⁹¹.

Nevertheless, in the end, damages for pain and suffering were introduced into the Civil Code, even if under the provision that they should be available only in cases for which the Code explicitly provided for them. As regard to the approach of the German jurisprudence, in 1955, the German Federal Supreme Court (*Bundesgerichtshof* - BGH) began to rethink the nature of such damages, by stating that «the claim for damages for pain and suffering under section 847 German Civil Code is not an ordinary claim for damages but instead a claim of its own character bearing a twofold function: this claim shall give to the victim adequate compensation for damages which are not pecuniary, and at the same time it shall take into account that the tortfeasor owes satisfaction for what he did to the victim»¹⁹².

¹⁹⁰ See M. TOLANI, *U.S. Punitive Damages before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 *Ann. Surv. Int'l & Comp. L.*, 2011, p. 196, according to which «Pain and honor was considered as incommensurable. Thus, money for pain and suffering was understood as a punishment under private law».

¹⁹¹ In fact, as stated in the preparatory documents to the German Civil Code, «[t]he principle of the common law according to which only the amount of losses caused by the tort exclusively determines the amount of damages to be restituted, was the only legally safe principle and was the only one to give justice to the victim». Moreover, see H.A. FISCHER, *Der Schaden nach dem Bürgerlichen Gesetzbuche für das Deutsche Reich*, 1903, p. 299 f., according to which it is difficult to assess the compensation of damages for pain and suffering adequately because there is no objective measure of pain and no one can feel someone else's pain.

¹⁹² BGHZ 18, 149 (149). Another important change can be found in case law relating to violations of the right to personality by the press. Firstly, the German Federal Supreme Court established that the right to personality is protected by tort law. Then, by analogy, it extended damages for pain and suffering to claims for violation of the right to personality, which was not specifically mentioned in section 847 of the German Civil Code. As a result, in a famous decision of 1958, the German Federal Supreme

In this respect, of utmost importance are the so-called Caroline-Judgments, which were rendered in 1995¹⁹³. The facts of the case related to two German tabloids, which showed that the Princess Caroline of Monaco was fighting against breast cancer. Inside the magazine, it was mentioned that the Princess herself did not suffer from cancer, but was pleading for preventive medical checkups. The Princess sued for a correction which should have made clear that the statement was wrong and asked for 100,000 Deutsche Mark (50,000 Euros) damages for the violation of her personal rights. The court of first instance held that the Princess would have the right of correction and awarded damages in the amount of 15,000 Deutsche Mark (7,500 Euros)¹⁹⁴. The Court of Appeals of Hamburg confirmed the decision, but the Federal Supreme Court of Germany reversed, stating that the amount of damages awarded was insufficient. First of all, the Supreme Court held that the focus should be on whether the wrongdoer misused the infringement of the personal rights to raise his profits and that relevant factors for the determination of the damages should be the impact and the consequences of the infringement, the reason and the motive of the tortfeasor and his degree of his negligence. Then, the court emphasized the aspect of satisfaction and prevention. It held that the amount had to be determined in such a way that the commission of similar torts would be deterred. Thus, according to the Supreme Court, the amount awarded would only be appropriate and perceptible for the wrongdoer, if it would be correspondent to the profits he made.

Therefore, since under German law there are situations in which more than purely compensatory damages are awarded¹⁹⁵, it is important to

Court awarded damages for pain and suffering for abuse of the photo of a famous person in a humiliating type of advertisement, even if (1) section 253 permitted damages for pain and suffering only in cases enumerated in the Code; (2) the right to personality was not listed in section 847 and, thus, (3) there was no reasonable legal basis for the decision either under the Code or by way of analogy.

¹⁹³ BGHZ 128, p 1 f. = NJW 1995, p. 861 f.

¹⁹⁴ M. TOLANI, *U.S. Punitive Damages before German Courts: A Comparative Analysis with Respect to the Ordre Public*, cit., 2011, p. 194 f.

¹⁹⁵ V. BEHR, *Punitive Damages in America and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts*, cit., p. 146 f., according to which «because punitive damage awards have increased in both frequency and

determine whether a foreign judgement that awards punitive damages would be in contrast to the basic principles of German law, being, thus, not enforceable.

In this respect, in June 1992, the German Federal Court of Justice issued the first and extensive opinion in this area of law¹⁹⁶.

The case concerned an American decision which condemned the defendant to pay damages in the amount of 700,000 USD (including 400,000 USD in punitive damages) to a minor who had been sexually abused. During the proceedings, the defendant, who had dual American-German citizenship, relocated to Germany and applied for recognition and enforcement of the judgement in Germany.

The Court's ruling is of particular interest because of its thorough and extensive explanation as to why U.S. punitive damages trigger the public policy exception found in article 328(1)4 of the *Zivilprozessordnung* (ZPO), i.e. the German Civil Code of Procedure¹⁹⁷.

importance, it is no longer clear whether such awards are merely tolerated exceptions to a monistic system, or whether they have become an integral part of a dualistic system of damages. To answer this, we first must realize that punitive damage awards have been applied to such broad areas that they can hardly be considered exceptional». As an example, apart from the awards of damages for pain and suffering, intellectual property and unfair trade practices cases are frequently governed by the notion of deterrence, which results in damages that are not purely compensatory. Thus, according to the Author, «although the punitive damages pillar does not yet equal the traditional compensatory pillar, at least German law has recognized the need to construct one».

¹⁹⁶ *Bundesgerichtshof*, Decision from 4.6.1992, BGHZ 118, 312. Moreover, see H. BUNGERT, *Enforcing U.S. Excessive and Punitive Damages Awards in Germany*, in *The International Lawyer*, Vol. 27, No. 4, 1993, pp. 1075-1076, according to which «at least five important judgments have emerged during the past five years, accompanied by an increase of German and American law review commentary. In 1989, the Landgericht Berlin (District Court of Berlin) denied recognition of a Massachusetts award of \$275,000 for pain and suffering and loss of earnings due to an industrial accident at a machine manufactured by the German defendant. In 1989 and 1992, the Oberlandesgericht Munchen (Munich Court of Appeals) held that a U.S. summons for punitive damages awards can be served upon a German defendant under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters».

¹⁹⁷ Article § 328 ZPO provides that:

(1) The recognition of the judgment of a foreign court is excluded:

The German Federal Court of Justice, first of all, stated that American damages suits were incompatible with the fundamental principles of German law¹⁹⁸, since the German private law systems provides for compensation for the damages suffered, but does not intend an enrichment of the victim.

Moreover, the *Bundesgerichtshof* held that punishment and deterrence, the main objectives pursued by punitive damages¹⁹⁹, are aims of criminal law rather than of civil law.

1. where the courts of the State to which the foreign court belongs have no jurisdiction under German law;

2. where the defendant, who has not appeared in the proceedings and relies on that fact, was not duly served with the document instituting the proceedings or was not served within sufficient time to enable him to arrange for his defense;

3. where the judgment is irreconcilable with a judgment rendered here, or with an earlier foreign judgment which is entitled to recognition, or where the proceeding which gave rise to the foreign judgment is irreconcilable with a proceeding instituted earlier here;

4. where the recognition of the judgment would produce a result which would be manifestly irreconcilable with fundamental principles of German law, especially where the recognition is irreconcilable with basic constitutional rights;

5. where reciprocity is not guaranteed.

(2) The provision contained in sub-paragraph 5 shall not prevent recognition of the judgment where that judgment relates to a non-pecuniary claim and the German courts had no jurisdiction under German law, or where a matter concerning the status of children (§ 640) is at issue.

¹⁹⁸ «An American punitive damages judgement of not insignificant amount globally awarded along with damages for material and immaterial losses in so far generally cannot be declared enforceable in Germany». Moreover, the German legal principle of awarding damages exclusively in order to reimburse the victim for what he has lost was held to be a fundamental principle of German law.

¹⁹⁹ The Federal Court of Justice summarized the functions of punitive damages as follows: « “Punitive or exemplary damages” are monies awarded beyond pure compensatory damages when the general elements of an offence are rendered more serious by intentional, malicious or reckless conduct (...). Punitive damages serve up to four main purposes: the offender shall be punished for his rough conduct so that possible acts of revenge by the victim become unnecessary. The offender and society in general shall be deterred from future anti-social behaviour so that the mere risk of a duty to compensate does not ensure a sufficient means to guide behaviour. The injured party shall be rewarded for the enforcement of law and order that is based on his commitment – to strengthening law and order in general. Ultimately, the victim shall receive a supplement to the compensation, which is perceived as insufficient, whereby

Furthermore, it stated that the effect of accepting punitive damages would be that the plaintiff would act as a "private prosecutor" and this would be incompatible with the State's monopoly on penalization and procedural safeguards introduced for this purpose²⁰⁰.

Then, the Supreme Court took its analysis one step further, by assessing whether punitive damages awards would pass the proportionality test. In fact, according to this principle, German courts must ensure that a damage award does not exceed the amount needed to compensate the injured party. In this respect, the *Bundesgerichtshof*, by expressing its disapproval of sums of money imposed on top of the compensation for damages, found that, in the case before it, punitive damages awarded were higher in amount than the sum of all the compensatory damages and, thus, the enforcement would have been excessive²⁰¹.

Finally, the Court pointed out the differences between punitive damages and damages for pain and suffering, holding that the function of deterrence and punishment is not comparable to the aspect of satisfaction which has to be considered in damages for pain and suffering and damages for the infringement of personal rights²⁰².

i.a. a lack of social safeguard can have an impact; in this respect one can consider the counterbalancing effect on the claimant's non-recoverable extrajudicial costs».

²⁰⁰ The German Supreme Court noted that there are examples of contractual penalties that provides for punishment under civil law. However, since contractual penalties originate from a legal agreement between parties, the Court found them to be irrelevant to the case at stake. See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, 35 *Polish Y.B. Int'l L.*, 2015, p. 244, according to which «this finding could have dismantled the civil/criminal distinction that the Court embraced and could have created an opening for punitive damages».

²⁰¹ . See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, p. 246, according to which «this statement may be interpreted such that the *Bundesgerichtshof* views a 1:1 ratio between compensatory and punitive damages as the maximum allowed».

²⁰² In fact, the Federal Court stated that: (1) for the determination of the damages for pain and suffering the level of the pain and suffering are the main aspects, (2) the aspect of satisfaction itself does not constitute a penal character of the damages for pain and suffering and, (3) the aspect of satisfaction would be connected to the aspect of compensation.

Moreover, the *Bundesgerichtshof* held that the enforcement of the punitive damages award should be denied because its enforcement in Germany would put foreign

Thus, the BGH concluded that an award of punitive damages is fundamentally contrary to German public order and refused to give recognition to the U.S. judgement.

This decision has been broadly accepted in German legal literature. However, the opinions of German scholars concerning the recognition of American punitive damages awards are divided.

Opponents argue that even if regulation and deterrence may be the aims of German tort law, they are achieved by means of «fair compensation»²⁰³. Instead, other scholars accept a partial acknowledgment of punitive damage judgments, by limiting it to the part that aims to compensation²⁰⁴.

creditors in a better position than domestic creditors, since the former would be able to gain access to the assets of German debtors to a considerably greater extent than the latter, even if the latter had suffered more damages. This leads, according to the Court, to a lack of equal treatment. See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 245, «it thus seems that the *Bundesgerichtshof* attempted to protect German industry from US litigation».

²⁰³ See N. JANSEN-L. RADEMACHER, *Punitive Damages in Germany*, p. 85 f., « [...] there are claims that go beyond the actual financial loss of the injured party. However, these claims are not based on punitive considerations. If these claims were to be understood as punitive, for the sole reason that they are not limited by the victim's loss, even claims under the law of unjustified enrichment would often have to be qualified as punitive, although these claims do not even presuppose a wrong on the defendant's part».

²⁰⁴ Another suggestion that has been proposed is to consider whether the main criteria for the American judgement was compensation. In this respect, some scholars suggest that only those judgements where the award is limited to an amount double the losses that would be awarded in the same case under German law can be enforced (see E.C. STIEFEL-R. STTRNER, *Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exzessiver Höhe*, in *VersR*, 1987, p. 829 f.). Moreover, see M. TOLANI, *U.S. Punitive Damages before German Courts: A Comparative Analysis with Respect to the Ordre Public*, cit., p. 203, according to which «according to a very liberal point of view, punitive damages should be acknowledged. A violation of the ordre public would be possible in only very narrow circumstances, e.g., in cases where the defendant was held liable multiply for punitive damages in the same case. In those cases the acknowledgement and enforceability in Germany would violate the requirement of proportionality».

In any case, the German jurisprudence does not intend a full failure to recognize and enforce U.S. punitive damages awards²⁰⁵.

In fact, in the abovementioned decision, the German Federal Court of Justice construed one exception to the unenforceability of punitive damages. Accordingly, punitive damages are not in contrast with the German public order and can, thus, be enforced in Germany, in so far as they serve to «offset the remaining, not especially satisfied or poorly evidenced financial disadvantages» or to disgorge the «profits aimed for by the defendant through the tortious conduct»²⁰⁶.

Moreover, the Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG), whereas it believes, like the Federal Court of Justice, that American punitive damages awards are alien to German law, is not convinced that such claims are incompatible with the state's penal monopoly. Thus, the Federal Constitutional Court emphasizes that the objectives pursued by U.S. punitive damages awards are partially compatible with the German legal system²⁰⁷.

In conclusion, as compared to common law countries and also to Italy, the situation in Germany appears to be diametrically opposed. Accordingly, in principle²⁰⁸ such punitive damages awards are refused

²⁰⁵ A. JANSSEN, *The Recognition and Enforceability of US-American Punitive Damages Awards in Germany and Italy: Forever Divided?*, in *Contratto e Impresa/Europa*, 2017, p. 48 f.

²⁰⁶ *Bundesgerichtshof*, Decision from 4.6.1992, BGHZ 118, 312 (340). Thus, the Court ruled that it would allow the enforcement of punitive damages to the extent that the punitive award pursues a compensatory function. Moreover, it required that the foreign judgement clearly indicate the compensatory purpose of any punitive award, otherwise German courts could not ascertain the motive behind the award, as this would violate the prohibition of *revision au fond* (i.e. a review of the merits of the judgement), provided for in article 723(1) ZPO. See W. WURMNEST, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23(1) *Berkeley Journal of International Law* 175, 2005, pp. 196-197, according to which in the United States, punitive damages may occasionally serve as compensation for losses that are difficult to prove, for losses that are not covered by other types of damages, or as a means to deprive the defendant of the gains he acquired through his wrongful behavior.

²⁰⁷ *Bundesverfassungsgericht*, Decision from 7.12.1994, BVerfGE 91, 335 (343).

²⁰⁸ In the 1992 judgement, the *Bundesgerichtshof* evoked some possible narrow exceptions: «the matter might be different if punitive damages are intended to compensate for some remaining economic disadvantages that have not been compensated, are hard to prove, or if they are intended to have the defendant disgorge

in Germany, whilst they can be recognized and enforced in Italy²⁰⁹. In fact, the Italian Supreme Court has developed a more extensive concept of international public order which it has to be referred to the complex of fundamental rights which are shared and protected by the entire international community. On the contrary, German courts maintain the traditional concept of national public order, thus, limited to the domestic legal framework.

It will remain to be seen in practice whether the differences in the result of these diverging approaches will remain, since there is now an increase in opinion that favors the basic recognition and enforcement of punitive damages awards in Germany²¹⁰. In addition, the recent decision of the Italian Supreme Court certainly raises the pressure on the German Federal Court of Justice to reconsider its present standpoint²¹¹.

2.2 France

As compared to Germany, France has adopted a more receptive and tolerant approach towards U.S. punitive damages. In fact, the French

profits realized as a result of the tort [...]. Shifting the plaintiffs litigation expenses [...] to the defendant is something that generally can be considered in this context».

²⁰⁹ As a result of the *Corte di Cassazione*'s decision no. 16601 of 05.07.2017.

²¹⁰ See V. BEHR *Strafschadensersatz: Poenale Elemente im Schadensersatzrecht*, in Hiebl, Kassenbohm, Lilie (eds.), *Festschrift für Volkmar Mehle zum 65. Geburtstag* (Nomos, 2009), p. 33 (46 f.); D. BROCKMEIER, *Punitive damages, multiple damages und deutscher ordre public* (Mohr Siebeck, 1999), p. 206; I. EBERT, *Pönale Elemente im deutschen Privatrecht* (Mohr Siebeck, 2004), p. 525 f.;

²¹¹ See A. JANSSEN, *The Recognition and Enforceability of US-American Punitive Damages Awards in Germany and Italy: Forever Divided?*, cit., p. 50 f., according to which «the current German approach of refusing to recognise and enforce US-American punitive damages awards is, for various reasons, becoming ever more subject of debate [...] the Federal Court of Justice will also have to follow the new developments in US-American punitive damages, whose importance in practice in Europe is overestimated anyway. Indeed, the Federal Court of Justice will have to rethink its approach if there is a continuation of the present trend in the USA to lower the level of punitive damages to a reasonable level. If there is no longer the threat of exorbitant “blockbuster-awards”, it will become increasingly difficult for German law to refer to the *ordre public* in refusing to recognise and enforce US-American punitive damages awards».

Supreme Court (*Cour de Cassation*) has no objection to the concept itself. Instead of completely rejecting punitive damages, the Court focuses on the amount of punitive damages awarded by the foreign court²¹².

The famous decision in which the French Supreme Court dealt with the enforcement of a U.S. punitive damages award was *Schlenzka & Langhorne v. Fountaine Pajot S.A.*²¹³.

In 1999, a couple from California purchased for almost \$800,000 a Marquises catamaran from Rod Gibbons' Cruising Cats USA, an authorized dealer and agent for the French manufacturer, Fountaine Pajot, S.A. According to the purchase agreement, Fountaine Pajot had to deliver the catamaran in Miami in «like-new» condition.

However, the vessel had been severely damaged in a storm that struck the port of La Rochelle, the place of its manufacturing. Fountaine Pajot concealed this information from the purchasers and performed only superficial repairs. Since the structural problems were not resolved, the California couple soon experienced issues with the catamaran and, thus, sued Fountaine Pajot in California.

²¹² See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 250, according to which «this more receptive stance increases the likelihood that the plaintiff will be able to enforce an American judgement containing punitive damages in its entirety against a defendant's assets in [...] France».

²¹³ Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A.*, no. 09-13303, *Recueil Dalloz*, 2011, p. 423.

In France, before *Fountaine Pajot*, there has been only one decision dealing with the enforcement of a U.S. judgement awarding punitive damages, in which the lower court refused to grant *exequatur* for two main reasons: (1) punitive damages are penal in nature and cannot be enforced in France, and (2) punitive damages violate the principle of full compensation (*principe de compensation intégrale*). Moreover, see B. WEST JANKE-F.X. LICARI, *Enforcing Punitive Damage Awards in France after Fountaine Pajot*, 60 *Am. J. Comp. L.*, 2012, p. 778, according to which «however, there were some faint hints in the jurisprudence that the *Cour de cassation* would recognize damages of a punitive nature. For example, French courts consistently enforce foreign sanctions based on contempt of court and penalty clauses (*clauses pénales*) in private contracts [...] By contrast, French doctrine was much more prolix in admitting, almost unanimously, the compatibility of foreign punitive damage awards with the French *ordre public* so long as the sum is not disproportionate or excessive».

In 2003, the California Superior Court ruled in favor of the plaintiffs and awarded them \$1,391,650.12 in actual damages. Moreover, the Court, holding that Fountaine Pajot's behavior constituted fraud under California Law, stated that an amount of \$1,460,000 in punitive damages²¹⁴ would have been suitable to punish and deter the French company. Furthermore, the California Superior Court applied a statutory exception²¹⁵ to the general American rule on attorneys' fees and, thus, awarded \$402,084.33, bringing the total amount to \$3,253,734.45.122. The American couple subsequently had to enforce the judgment in France, since Fountaine Pajot was located there.

Le Tribunal de Grande Instance refused to enforce the California judgement in France and this decision was, subsequently, confirmed by the Court of Appeal²¹⁶, which held that the proper purpose of tort law is to return the victim to the *status quo* and, thus, the amount of damages should not be based on the wrongdoer's wealth nor his fault, but it should be determined solely by the extent of the plaintiff's damages. Consequently, the appellate court considered an award that punishes the tortfeasor to the benefit of a plaintiff as a windfall²¹⁷, which unjustly

²¹⁴ The Court noted that the purpose of awarding punitive damages is not to bring financial ruin to the defendant, but, instead, to punish the defendant and deter it from engaging in such conduct in the future. Thus, it held that an award of \$1,460,000.00, «which is approximately twenty percent of the net worth of the corporation», was appropriate.

²¹⁵ On the basis of the federal Magnudon-Moss Warranty Act, a prevailing consumer may recover reasonable legal costs.

²¹⁶ . See *Cour d'Appel [CA] de Poitiers, Ire Chambre civile*, Feb. 26, 2009, *Schlenzka v. S.A. Fountaine Pajot*, no 07/02404, 137 *JDI*, 2010, 1230.

²¹⁷ See J.A. BRESLO, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 *Nw. U. L. Rev.*, 1992, p. 1130 f. On the contrary, see B. WEST JANKE-F.X. LICARI, *Enforcing Punitive Damage Awards in France after Fountaine Pajot*, cit., p. 790, according to which «[...] in reality, there is not always a windfall or even full compensation for the plaintiff because there are many legal or factual obstacles to a veritable full compensation»; R. DEMOGUE, *Validity of the Theory of Compensatory Damages*, 27 *Yale L.J.*, 1918, pp. 585-593, which supports punitive damages and regards them as a means to fully implement the principle of full compensation. In fact, many scholars believe that the American rule, regarding attorneys' fees, is a significant impediment to principle of full compensation. Accordingly, since the plaintiff generally may not recover his attorney fees, paradoxically, punitive damages can sometimes operate to fill the gap and achieve full compensation.

enriches him and, as such, in contrast with the French *ordre public international*²¹⁸.

Ultimately, the matter reached the French Supreme Court, which, for the first time, took a stance on punitive damages, ruling that «the principle of awarding punitive damages is not, in itself, contrary to public policy; although this is not the case when the amount awarded is disproportional to the loss suffered and to the contractual breach of the debtor²¹⁹». Thus, according to the Court, this lack of the proportionality of the award was contrary to the *ordre public international* and, as a consequence, the *Cour de Cassation* rejected the entire judgement.

This judgement is particularly significant, since punitive damages are not *per se* incompatible with the French public policy, in so far as they are not disproportionate. Thus, the center of the public policy analysis moves from the incompatibility of punitive damages themselves to an examination of their amount²²⁰.

²¹⁸ See B. WEST JANKE-F.X. LICARI, *Enforcing Punitive Damage Awards in France after Fountain Pajot*, cit., p. 791 f., according to which «we regard the appellate court's determination as incorrect and incongruent with how the *Cour de cassation* has interpreted principles of compensation in light of the *ordre public international*». According to the Authors, the *Cour de Cassation* has rejected many decisions of lower courts that granted awards higher or lower than the damage actually suffered, by referring to the concept of *ordre public interne*, which involves purely domestic considerations. However, cases involving the recognition of foreign judgments deal with the *ordre public international*, which refers to «a set of intangible and superior values, which combine the general (or public) interest, such as political, moral, and social rights. [It is a doctrine] whereby the courts will reject foreign laws or judgments when they are considered contrary to fundamental national cultural values» (see M.L. NOBOYET-G.G. de LA PRADELLE, *Droit International Privé* no 307, 2009). As a consequence, a foreign law or a foreign judgment offending the *ordre public interne* is not sufficient to trigger the *ordre public international* exception.

²¹⁹ «Le principe d'une condamnation à des dommages interest punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur».

²²⁰ See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 255, according to which «this revolutionary ruling makes it clear that objections against the enforcement of punitive damages based on the argument that they violate the divide between criminal and private law should be dismissed. This liberal, welcoming attitude on the

However, the Supreme Court did not provide guidelines on how to determine whether a foreign punitive damages award is excessive. In fact, it just stated that punitive damages should not be disproportionate in relation to the injury suffered and the breach of the contractual obligations of the debtor. Though, the absence of determined criteria creates uncertainty, since the determination of the proportional nature of the award lies in the discretion of the lower courts.

In this respect, scholars have proposed two different solutions²²¹.

On one hand, a comparison between the amount of punitive damages and the amount of compensatory damages awarded may be required. In fact, the *Cour de Cassation* asserted that the award of punitive damages greatly exceeded the compensatory damages²²². This may be interpreted as meaning that the Court suggests a 1.1 maximum ratio between punitive and compensatory damages²²³.

On the other hand, scholars have taken into account the *Cour de Cassation's* reference to the defendant's breach of the contract. Even if the dispute arose from a contract between the parties and, consequently, the French Supreme Court had to adapt the language of its judgment to the contractual origin of the litigation, it is possible to extrapolate the *Cour de cassation's* statement to tort law as well. Thus, the term «contractual breach of the debtor» can be understood as referring to the seriousness of the debtor's wrongful behavior, the degree of culpability

part of France's Supreme Court appears [...] to be very progressive». Moreover, this corresponds also to the attitude of the Spanish Supreme Court in *MillerImport Corp. v. Alabastres Alfredo, S.L.*

²²¹ See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 255 f.

²²² The difference between them was \$70,000.

²²³ See C. VANLEENHOVE, *The Current European Perspective on the Exequatur of U.S. Punitive Damages: Opening the Gate but Keeping a Guard*, cit., p. 256, according to which «such a 1:1 ration stands in sharp contrast with the single digit rule (i.e. a maximum ratio of 9:1) established by the US Supreme Court when setting limits to punitive awards in the US». Moreover, according to the Author, «it could be argued that the amount awarded for attorneys' fees (*in casu* USD 402,084.33) should be added to the compensatory damages when calculating the ratio. Legal costs are in essence also a form of loss caused by the defendant. Of course, this scenario is quite exceptional because US litigants almost always bear their own costs, even if they win the case».

or blameworthiness of the fault²²⁴. As a consequence, according to this second approach, it is required to consider the conduct of the defendant when assessing the possible excessiveness of the foreign punitive damages award, together with the amount of compensatory damages given to the victim²²⁵.

Whatever approach is applied, the application of the principle of proportionality shows that the *Cour de Cassation* has taken into account the evolution of the U.S. jurisprudence, which, starting from the *BMW v. Gore* case, has progressively introduced limits as regard to the determination of the amount of punitive damages²²⁶. Thus, the French Supreme Court, by referring to the principle of proportionality while enforcing a foreign judgement which awards punitive damages, has applied the same criterion used in the State where such damages are awarded²²⁷.

Moreover, the statement of the French Supreme Court, according to which punitive damages are not *per se* contrary to the French public policy, is not extremely surprising, since French scholars and lawyers generally agree that the purpose of tort law is not only to compensate damages²²⁸. In fact, they believe that deterrence and punishment are two

²²⁴ See N. MEYER FABRE, *Recognition and Enforcement of U.S. Judgments in France: Recent Developments*, in *The International Dispute Resolution News* 6, 2012, p. 4.

²²⁵ See C.I. NAGY, *Recognition and enforcement of US judgments involving punitive damages in continental Europe*, in *1 Nederlands Internationaal Privaatrecht* 4, 2012, p. 9, according to which «generalizing this statement, it may be concluded that the punitive award's excessiveness is to be assessed in relation to the amount of actual damages (in this case the punitive part exceeded the compensatory part) and it is to be taken into account how blameworthy the fault is».

²²⁶ See *supra* §1.2.

²²⁷ See F. BENATTI, *La circolazione dei danni punitivi: due modelli a confronto*, in *Corriere giuridico*, 2, 2012, p. 266, according to which «si tratta pur sempre di un parametro soggettivo, con la conseguenza che in Francia potrebbero essere considerati eccessivi risarcimenti, valutati invece proporzionali nell'esperienza americana abituata a misure più elevate».

²²⁸ See J.S. BORGHETTI, *Punitive Damages in France*, in *Punitive Damages: Common Law and Civil Law perspectives*, H. KOZIOL – V. WILCOX (eds.), 2009, p. 68, according to which «the existence of punitive damages in some countries, especially the United States, has attracted much attention in France and has been a source of inspiration and discussion».

other functions of civil liability and that French law provides for some mechanisms which do not principally aim to compensating the damage but are mostly intended to punish the wrongdoer. Thus, French tort law seems to act as a form of “private penalty” (*peine privée*)²²⁹.

An example of this *peine privée* function is the so-called *astreinte* which is a periodic penalty payment which can be imposed by a court, according to which a debtor has to pay to the creditor, in addition to his initial debt, a certain sum until he fulfils his duty. Thus, *astreinte* bears a close resemblance to punitive damages, since the money paid by the debtor exceeds the harm actually suffered by the creditor, who receives more than the amount of his loss²³⁰.

Furthermore, there are fields where it is widely believed that French courts set damages not only on the basis of the harm suffered by the plaintiff, but also by taking into account the behavior of the tortfeasor, with the aim of punishing him when he appears to have been guilty of a deliberate contempt of the plaintiff’s interest. An example is the competition field²³¹. In fact, although there is no hard data²³², most authors agree that in matters of unfair competition, when the courts set

²²⁹ See M. FABRE-MAGNAN, *Droit des obligations. 2- Responsabilité civile et quasi-contrats*, 2007, p. 13 f.; S. CARVAL, *La responsabilité civile dans sa fonction de peine privée*, foreword G. VINEY, 1995; B. MAZABRAUD, *La peine privée. Aspects de droit international*, thèse Paris 2, 2006.

²³⁰ See J.S. BORGHETTI, *Punitive Damages in France*, cit., p. 58, according to which «there remain some differences, however, between *astreinte* and punitive damages, the first one being that the legislator has explicitly distinguishes *astreinte* from damages. Besides, *astreinte* is usually imposed when the debtor is in breach of a contractual duty or of an explicit statutory duty. one hardly sees how *astreinte* could apply in matters of extra-contractual liability, except where a tortfeasor refuses to pay a victim damages which he has already been condemned to pay by a court or which he has agreed to pay under a settlement».

²³¹ See Cass. 1re civ., 31st May 2007, no. 05-19.978, *Revue des contrats (RDC)*, 2007.1118, with a commentary of Y.M. LAITHIER, according to which the existence of punitive damages was made even more obvious when the Cour de Cassation decided that the mere violation of a non-competition clause entitles the creditor to receive damages, without him having to demonstrate the existence of the damage.

²³² See Y. CHAPUT, *Clientèle et concurrence. Approche juridique du marché*, 2000, p. 109, which analyses around 200 decisions relating to unfair competition and reaches the conclusion that damages are often awarded in order to punish the defendant. However, no estimate is given of the amount of punitive damages.

damages, they sometimes take into account not only the harm actually suffered by the plaintiff but also the profits which the defendant reaped from his culpable behavior²³³.

Furthermore, many authors²³⁴ have expressed the opinion that punitive damages should be introduced into French law. In their views, since criminal law is not always an adequate tool to fight against all such behaviors, punitive damages would be the best way.

In this respect, a group of French academics, led by Professor Pierre Catala, took the occasion of the 200th anniversary of the Civil Code to draft a project (*Avant-projet Catala*) which aims to update the part of the Civil Code dedicated to the law of obligations. As far as damages are concerned, the *Avant-projet* starts by affirming the principle of overall compensation, stating that «Subject to special regulation or agreement to the contrary, the aim of an award of damages is to put the victim as far as possible in the position in which he would have been if the harmful circumstances had not taken place. He must make neither gain nor loss from it»²³⁵. However, article 1371 of the *Avant-projet* immediately places an exception to this principle, by allowing for the payment of punitive damages in certain circumstances: «A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned, in addition to compensatory damages, to pay punitive damages, part of which the court may at its discretion allocate to the Public Treasury. A court's decision to order the payment of damages of this kind must be supported with specific reasons and their amount

²³³ See Cass. Com., 17th November 1998, *Revue de jurisprudence de droit des affaires (TJDA)* 3/99, no. 358, which upheld an appellate court's decision which took the defendant's fault into account in setting an award of damages.

²³⁴ See M. CHAGNY, *Droit de la concurrence et droit commun des obligations*, foreword J. GHESTIN, 2004, p. 692 f.; G. MAÎTRE, *La responsabilité civile à l'épreuve de l'analyse économique du droit*, foreword H. MUIR-WATT, 2005, p. 303 f.

²³⁵ Article 1370 of the *Avant-projet*: «Sous réserve de dispositions ou de conventions contraires, l'allocation de dommages-intérêts doit avoir pour objet de replacer la victime autant qu'il est possible dans la situation où elle se serait trouvée si le fait dommageable n'avait pas eu lieu. Il ne doit en résulter pour elle ni perte ni profit».

distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance»²³⁶.

However, the *Avant-projet* has also attracted widespread criticism, some of which was directed at the very concept of punitive damages²³⁷ and some at the way in which article 1371 regulates such damages. In fact, in a report on the *Avant-projet* drafted by the Paris Chamber of Commerce and Industry²³⁸, punitive damages would give an excessively punishing flavor to civil liability and this would create confusion with criminal liability, whereas civil liability should abide with the principle of overall compensation. Moreover, the reporters are of the opinion that the courts can already efficiently sanction wrongdoers through a generous award of compensatory damages. Furthermore, the introduction of punitive damages had been criticized in a report drafted by a working group set up by the *Cour de Cassation*, chaired by Pierre Sargos, a former president of the *Chambre sociale de la Cour de Cassation*²³⁹. The group stated that the definition of the type of fault which would enable the courts to award punitive damages is too

²³⁶ Article 1371 of the *Avant-projet*: «L’auteur d’une faute manifestement délibérée, et notamment d’une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d’octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables». Moreover, see J.S. BORGHETTI, *Punitive Damages in France*, cit., p. 70, according to which «this provision has probably been partly inspired by the position in Québec. The new Civil Code of Québec incorporates punitive damages and this has probably convinced many French lawyers, including the drafters of the *Avant-projet*, that this mechanism, though it originates from the common law, can be reconciled with the principles of the civil law tradition».

²³⁷ See Y. LAMBERT-FAIVRE, *Les effets de la responsabilité*, in *RDC*, 2006, pp. 163-164; M. BEHAR-TOUCHAIS, *Is civil penalty a satisfying substitute for the lack of punitive damages*, in *LPA*, 2002, n. 232, p. 36, according to which France’s civil penalty is a sufficient alternative to punitive damages, especially because it prevents unjust enrichment of the victim and provides for adequate prevention and deterrence.

²³⁸ D. KLING, *Pour une réforme du droit des contrats et de la prescription conforme aux besoins de la vie des affaires. Réactions de la CCIP à l’avant-projet “Catala” et propositions d’amendements* (2006) 119.

²³⁹ Rapport du groupe de travail de la Cour de cassation sur l’avant-projet de réforme du droit des obligations et de la prescription, 15th June 2007, no. 91.

imprecise and the allocation of punitive damages to the Public Treasury alleviates the differences between *amende civile* and *astreinte*. Finally, the group expressed the opinion that French tort law should remain bound to the principle of overall compensation and that punishment of blameworthy behavior should be realized through the development of adequate criminal and administrative sanctions.

Despite criticism, the *Avant-projet* was presented to the French Minister of Justice in September 2005. Although the government declared it was very interested in the draft, the *Catala* Draft was replaced by a draft from the Department of Justice that did not even mention punitive damages.

Even if hopes faded, the French legal system is constantly evolving, and it is likely that any future legislative change in the field of the law of obligations will be assessed in the light of the *Avant-projet*, or at least compared to it²⁴⁰.

²⁴⁰ In July 2010, the First Legislative Chamber registered a new proposal (*Béteille Proposal*), the purpose of which is to reform and codify present tort law. Its punitive damages provision is to be found in articles 1386-25, *Béteille Proposal*, which provides that: «In cases where the law expressly provides so, when the damages result from a deliberate wrongdoing or a deliberate breach of contract and has led to an enrichment of the wrongdoer resp. promisor that the sole compensatory damages cannot eliminate, the judge can condemn, by a motivated decision, the inflictor of the damages to the payment, in addition to compensatory damages for the harm suffered in accordance with Article 1386-22, of punitive damages, the amount of which may not stand out twice the amount of the compensatory damages.

According to shares decided by the judge, the punitive damages are respectively paid to the victim and to a fund whose purpose is to compensate harm similar to the one suffered by the victim. When such a fund does not exist, the share of the punitive damages which is not attributed to the victim should be paid to the Treasury». Moreover, in 2010, a third reform draft was officially submitted by the so-called *Terré* drafting group to the Minister of Justice and published in March 2011 (*Terré Tort Draft*), whose article 69 reads as follows: «Subject to any specific provision, the form and amount of the reparation may have a symbolic reach. When the harm is caused by an intentional fault, the judge may condemn the wrongdoer, by an especially reasoned decision, to exemplary damages». While the *Béteille Proposal* originates from a legislative body, the *Terré Tort Draft*, like the *Catala Draft*, are both initiatives of university scholars. On the contrary see J.S. BORGHETTI, *Punitive Damages in France*, cit., p. 72, according to which «[...] it seems unlikely that the legislator will officially introduce punitive damages into French law in the coming years. The reactions to the *Avant-projet* have shown that not only business circles but also many lawyers, judges and academics are hostile to this institution».

CHAPTER III: Punitive Damages in the European Union

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1. Introduction

As seen in the previous chapter, the availability of punitive damages has long been recognized in common law jurisdictions, such as the United States, Canada and Australia.

In the European Union only the common law countries England, Wales, Ireland, Northern Ireland and the mixed system of Cyprus provide for specific kind of damages in their respective legal systems. On the contrary, in European civil law countries the concept of punitive damages is scarcely recognized, since their laws of damages do not aim to punish the tortfeasor, but rather serve to compensate the victim for the damage suffered.

Despite this, European policymakers and legal scholars are increasingly taking into account the possibility of introducing punitive damages into their tort systems. This derives, in particular, from changing views as regard to law enforcement and the functions of tort law²⁴¹. Accordingly, growing attention is paid to the preventive function of tort law. In fact, inspired by the American experience, it is argued that punitive damages act as financial incentives, because they stimulate injured parties to file

²⁴¹ See Italy in Chapter 1 and France in Chapter 2 §2.2.

civil claims²⁴². Moreover, victims of the unjust behavior thereby could help to detect wrongful conduct and to encourage wrongdoers to act properly.

Thus, due to this growing attention, it is important to examine, first of all, the reasons why Continental Europe is unfamiliar with the phenomenon of punitive damages, and, afterward, the approach which both the European legislator and the Court of Justice of the European Union adopt as regard to this particular remedy.

2. Traditional Rejection of Punitive Damages

At least three important features seem to prevent the existence of punitive damages in civil law systems worldwide²⁴³.

Firstly, the legal remedy is incompatible with the traditional functions of tort law. The second reason, which rely on first, is the division between private law and criminal law, which seems to prevent the introduction of punitive damages. Finally, the third issue is that different views on the role of government might explain the absence or presence of punitive damages in a certain legal system.

Those three main characteristics, which form the main justification of the rejection of punitive damages in the European Union, will be now explained.

2.1 The Functions of Tort law

The first reason of the absence of punitive damages in European civil law systems relates to the traditional compensatory function of tort law. In fact, civil law systems believe that tort law pursues primarily a compensatory function and see the aims of deterrence and punishment as additional functions that cannot exclusively form the basis of a

²⁴² A relevant example is the development in the field of EU Competition law, as explained *infra* §4.

²⁴³ See L. MEURKENS, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in L. MEURKENS-E. NORDIN (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, 2012, p. 13 f.

damages award²⁴⁴. As a consequence, if an injured person brings a civil action for damages and the court rules in his favor, the wrongdoer must exclusively restore the victim to his status prior to the injury (principle of *restitution in integrum*).

Therefore, because of their aims, punitive damages are inconsistent with the traditional compensatory function of tort law and, thus, cannot be awarded.

However, it should be borne in mind that perspectives on the functions of tort law are subject to change and are always reflected by desires in society²⁴⁵. As an example, unlike in the past, many European Member States have recognized and accepted other functions of tort law, thus, not confining tort law to a purely compensatory aim²⁴⁶.

Moreover, some authors²⁴⁷ believe that the compensatory function should not be overestimated for two reasons. First of all, tort law is not the exclusive source of compensation, since most compensation money in Europe comes from other sources, such as the social security system²⁴⁸. This derives also from the idea that tort law is not the most

²⁴⁴ See T. HARTLIEF, *Ieled deaagt zijn eigen schade*, Deventer, 1997, p. 16 f.; U. MAGNUS, *Comparative Report on the Law of Damages*, in U. MAGNUS (ed.), *Unification of Tort Law: Damages*, The Hague, 2001, p. 185.

²⁴⁵ See L. MEURKENS, *The Punitive Damages Debate in Continental Europe: Food for Thought*, cit., p. 15, «[...] tort law has a “high policy impact”, which results in different views on the most favourable approach».

²⁴⁶ See Italy in Chapter 1 and France in Chapter 2 §2.2.

²⁴⁷ See S. DEAKIN-A. JOHNSTON-B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Oxford, 2008, p. 52. Moreover, see L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, Deventer, 2014, p. 156, «[...] it is incorrect to state that tort law has only one function. Although the one function may be less apparent than the other, none of the[se] functions [...] “offers a complete justification for the law”. Tort law has a *combination* of functions, and it depends on societal and political circumstance and per legal system which functions are predominant. [...] to suggest that compensation is the function of tort law would be the same error as to suggest that divorce is the function of divorce. Rather, the primary function of tort law is the determination of *when* compensation is required».

²⁴⁸ See A. CAVALIERE, *Product Liability in the European Union: Compensation and Deterrence Issues*, in *Eur J. L. & Econ.*, 2004, p. 307; N. JANSEN, *Law of Torts/Delict, General and Lex Aquilia*, in J. BASEDOW-K.J. HOPT-R. ZIMMERMANN (eds.), *The Max Planck Encyclopedia of European Private Law*, Volume II, Oxford, 2012, p. 1038; K. OLIPHANT, *Cultures of Tort Law in Europe*, in *JETL*, 2012, p. 155.

efficient system of compensation²⁴⁹. Secondly, by emphasizing the compensatory aim, other important functions are undervalued, such as the restitution one²⁵⁰.

However, despite these critics against the compensatory function of tort law, it is generally accepted that the law of damages, despite the recognition of other functions, is based on the idea of compensation²⁵¹. Anyway, the idea that tort law pursues also other functions is, for example, shown by the Principles of European Tort Law (PETL)²⁵² and the Draft Common Frame of Reference (DCFR)²⁵³.

²⁴⁹ See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, p. 158, according to which « [...] the civil procedure is rather costly and time consuming, notwithstanding the existence of procedural mechanisms such as legal aid and class actions [...] that improve access to justice».

²⁵⁰ See W. VAN GERVEN-J. LEVER-P. LAROCHE, *Tort Law*, Oxford, 2000, p. 741, according to which the general idea behind restitution is that the tortfeasor should be prevented from being unjustly enriched by his tortious behavior.

²⁵¹ See G.E. WHITE, *Tort law in America – An Intellectual History*, Oxford, 2003, p. 62, according to which « [...] it should be recalled that tort actions, prior to 1900, had not principally been conceived as devices for compensating injured persons. Compensation had been a consequence of a successful tort action, but the primary function of tort liability had been seen as one of punishing or deterring blameworthy civil conduct».

²⁵² The PETL are an initiative of the European Group on Tort Law, which is composed by a group of tort law scholars, established in 1992. The mission statement of the group is formulated as follows: «The European Group on Tort Law aims to contribute to the enhancement and harmonization of tort law in Europe through the framework provided by its Principles of European Tort Law (PETL) and its related and ongoing research, and in particular to provide a principled basis for rationalization and innovation at national and EU level».

²⁵³ The DCFR is a project of the Study Group on a European Civil Code in cooperation with the Research Group on EC Private Law. The Study Group is also a network of European scholars who conduct comparative research in private law. However, contrary to the European Group on Tort Law, which can be seen as a private initiative, the Study Group on a European Civil Code is the result of two Resolutions of the European Parliament activating the legal academic community in order to create a European Civil Code (European Parliament Resolutions OJ C 158, Resolution of 26 May 1989, and OJ C 205, Resolution of 6 May 1994). Furthermore, the DCFR was partly funded by the European Union. Although the Study Group emphasizes that it is a non-political body with a purely academic task, the involvement of the European Union and the task to do research into private law gives the DCFR a different status

In the PETL, article 10:101, on the nature and purpose of damages, states that: «Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm».

Thus, it can be noted that the compensation of the harm, based on the principle of *restitution in integrum*, is the primary purpose of damages. However, beside the compensatory aim, damages serve also another function: to prevent the harm²⁵⁴.

As regard to the DCFR, the main purpose of tort law is the protection of human and basic rights at the level of private law through the legal remedies that are made mutually available between citizens. Therefore, article 1:101 of book VI, DCFR, gives the person who suffers legally relevant damage a right to reparation from the liable person (*restitution in integrum*). Moreover, another important function, like the PETL, is the preventive one²⁵⁵. However, as stated in the Commentary to the PETL, the Commentary to the DCFR makes as well clear that the

than the PETL. The aim of the Study Group reads as follow: «The aim of the Study Group is to produce a set of codified principles for the core areas of European private law (patrimonial law). Although the foundation for our work is detailed comparative law research, the principles which we are fashioning will represent more than a mere restatement of the existing law in the various EU jurisdictions from the standpoint of the predominant trends among the diverse legal regimes. Instead the Study Group seeks to formulate principles which constitute the most suitable private law rules for Europe-wide application».

²⁵⁴ According to the Commentary to the PETL, this means that «by the prospect of the imposition of damages a potential tortfeasor is forced or at least encouraged to avoid doing harm to others». However, as regard to a (possible) punitive function of damages, the Commentary clearly states that «the borderline between the aim of prevention and the aim of punishment may be sometimes difficult to draw. But it is clear that the Principles do not allow punitive damages which are apparently out of proportion to the actual loss of the victim and have only the goal to punish the wrongdoer by means of civil damages».

²⁵⁵ See G. WAGNER, *Punitive Damages*, in J. BASEDOW-K.J. HOPT-R. ZIMMERMANN (eds.), *The Max Planck Encyclopedia of European Private Law*, Volume II, Oxford, 2012, p. 1406, according to which the preventive function should be understood in terms of injunctive relief.

punishment of the wrongdoer is not a function of tort law and, consequently, punitive damages should not be accepted²⁵⁶.

Thus, the conclusion that should be drawn from the above is that damages serve primarily a compensatory function, but this is not the exclusive one, since the preventive aim is comprised too.

Moreover, the fact that both initiatives reject punitive damages does not *per se* mean that there is no support in Europe for punitive damages. Accordingly, notwithstanding the involvement of the European Union in case of the DCFR, both soft law initiatives might guide and inspire the European tort law debate and policymakers as well, but they should always be seen as non-binding contributions to the academic debate²⁵⁷.

2.2 The Division between Private Law and Criminal Law

As seen in the previous section, one of the difficulties with punitive damages in civil law jurisdictions is that this remedy cannot be accepted in a tort system based on the central function of compensation.

However, the idea that tort law has a compensatory rather than a punitive purpose is not only based on the academic analysis of tort law as such, but results also from the strict division between private law and criminal law, which is considered «an achievement of modern legal culture»²⁵⁸.

²⁵⁶ The Commentary to DCFR states that: «These Principles are based on the fundamental maxim that the aim of the law on liability under private law is not to punish. Punishment belongs to the realm of criminal law whereas the function of the law on liability in private law is compensatory, nothing more and nothing less. For this reason, punitive damages do not form part of these Principles». Moreover, see C. VON BAR-E. CLIVE, *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Volume 4, Munich, 2009, p. 3724, according to which «the punishment of wrongdoers is a question for criminal law, not private law. Under these model rules, punitive damages are not available. They are not consistent with the principle of reparation».

²⁵⁷ See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., pp. 166-167, according to which «[...] these two harmonizing initiatives are arguably outdated and not suitable to signal new developments. [...] This insight makes clear that there is room for different views on a punitive function of tort law and punitive damages in Europe».

²⁵⁸ H. KOZIOL, *Punitive Damages – A European Perspective*, in *LA L. Rev.*, 2008, pp. 755-756. However, the distinction between private law and criminal law is considered

In fact, first of all, criminal law has a punitive, retributive and deterrent function which cannot be principally said of tort law²⁵⁹.

as a typical difference between common law and civil law systems. In fact, even if common lawyers respect such division, they do not put so much weight on it. In particular, this has to do with historical and cultural differences. In this respect, see M.L. WELLS, *A Common Lawyer's Perspective on the European Perspective on Punitive Damages*, in *LA L. Rev.*, 2010, p. 560, according to which «[...] lawyers, judges, and legislators trained in the civil law learn that law is a body of rules and are thereby better equipped to maintain the formal distinction between the two domains in the face of policy arguments for exceptions. By contrast, students of the common law study discrete cases and the facts, reasons, and distinctions courts rely on to resolve them. The history of the common law is one of endless innovation and assimilation of new ideas. General principles are always giving way, and students learn that rule-based arguments routinely lose in the battle between form and substance. The acceptance of punitive damages is an illustration of that general theme».

²⁵⁹ On the contrary, see H. KOZIOL, *Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusions*, in H. KOZIOL-V. WILCOX (eds.), *Punitive Damages: Common Law and Civil Law Perspective*, Vienna, 2009, p. 751, according to which the idea of a sanction could also be relevant for tort law since «the legal consequences of an act are attached to a violation of a duty and faulty behavior». Moreover, see the statement of Lord Wilberforce in *Cassell & Co. Ltd. v. Broome* (1972), in which he made clear that «English law does not work in an analytical fashion; it has simply entrusted the fixing of damages to juries upon the basis of sensible, untheoretical directions by the judge with the residual check of appeals in the case of exorbitant verdicts. That is why the terminology used is empirical and not scientific. And there is more than merely practical justification for this attitude. For particularly over the range of torts for which punitive damages may be given (trespass to person or property, false imprisonment and defamation being the commonest) there is much to be said before one can safely assert that the true or basic principle of the law of damages in tort is compensation, or, if it is, what the compensation is for (if one says that a plaintiff is given compensation because he has been injured, one is really denying the word its true meaning) or, if there is compensation, whether there is not in all cases, or at least in some, of which defamation may be an example, also a delictual element which contemplates some penalty for the defendant. [...] It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements.

Moreover, whereas both criminal law and private law deal with unlawful conduct, nonetheless, a crime constitutes a public wrong (a wrong to the society), whilst a tort is a civil wrong (a wrong to the individual victim)²⁶⁰.

Another difficulty concerning the possible introduction of punitive damages in Europe is the compatibility of this civil remedy with criminal procedural safeguards. In fact, in juridical systems characterized by a strict division between criminal and private law, the imposition of civil sanctions may be considered as a violation of the fundamental principles underlying criminal law²⁶¹.

One of the most important procedural safeguard is the principle of legality, also known as the rule of law, according to which a conduct does not constitute a crime and punishment is forbidden unless laid down in the law (*nulla poena sine previa lege*). The problem with this particular remedy is that, through the use of vague norms such as “malice” or “gross negligence”, it is unclear what kind of conduct may lead to the award of punitive damages²⁶².

Furthermore, a second principle that is often brought forward in the punitive damages debate is the principle of double jeopardy (*ne bis in idem*), meaning that prosecution cannot be pursued twice for the same

As a matter of practice English law has not committed itself to any of these theories: it may have been wiser than it knew».

²⁶⁰ Critics consider reckless to transfer public powers to private individuals, because they are influenced too much by their own private interests and lack the objectivity and accountability that is needed in order to exercise public powers. See M.H. REDISH-A.L. MATHEWS, *Why Punitive Damages are Unconstitutional*, in Emory L. J., p. 3-4, according to which in their decision-making, individuals are «free from the ethical, political, and constitutional constraints imposed on public actors».

²⁶¹ See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, p. 174, according to which «these principles are important as they have been created to protect citizens against the far-reaching prosecuting powers of the state, and they form part of every modern legal system».

²⁶² See Law Commission for England and Wales Report, 1997, p. 99, according to which «The ‘rule of law’ principle of legal certainty dictates that the criminalization of conduct is in general properly only the function of the legislator in new cases: it further dictates that there is a moral duty on legislators to ensure that it is clear what conduct will give rise to sanctions and to deprivation of liberty. Broadly-phrased judicial discretions to award exemplary damages ignore such consideration».

wrongful behavior. In this regard, the question that arises is whether a wrongdoer could be obliged to pay punitive damages when he has already been sanctioned through criminal or administrative law and *vice versa*²⁶³.

Consequently, punitive damages cannot be introduced in the European civil law systems without giving fair consideration to certain problems relating to the division between criminal and private law, particularly as regard to the compatibility with criminal procedural safeguards.

2.3 The Role of the Government

The third assumed reason for the absence of punitive damages relates to the role of government and the way in which governmental policy choices influence the view on tort law in Continental Europe.

A comparison between the United States and the European Union will be useful, particularly as regard to products liability law.

First of all, it is important to highlight the fact that American civil litigation and, specifically, punitive damages awards pursue a regulatory function as a surrogate for the government. On the other side, in Europe the regulatory function is primarily fulfilled by governmental authorities and not by civil litigation.

As regard to products liability law, the United States is known as the home of this particular field of law, since American courts were the first to recognize that victims of a product-related accident should be able to obtain compensation for the damage suffered²⁶⁴.

In this respect, American courts do not award punitive damages in products liability cases as frequently as one might think. This is because

²⁶³ See Law Commission for England and Wales Report, p. 99, which states that «Defendants should not be placed in jeopardy of double punishment in respect of the same conduct, yet this would be the result if a defendant could be liable to pay both a criminal fine following conviction in the criminal courts and an exemplary damages award after an adverse decision in the civil courts».

²⁶⁴ See *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436, CA. 1944, in which the California Supreme Court stated that consumers need to be protected against business and that the latter should bear the costs of the harm inflicted on consumers.

punitive damages are far more often awarded in cases concerning intentional torts, defamation and financial torts than in cases concerning personal injury resulting from products liability, medical malpractice, car accidents, and negligence.

Nevertheless, products liability occupies a central role in American law and no other country in the world has a similar products liability legislation, which also includes the awarding of punitive damages. This is explained by the fact that, in the United States, products liability litigation is perceived as a surrogate for other compensation mechanisms. Furthermore, contrary to Europe, products liability litigation is used as a regulatory tool²⁶⁵.

As regard to the European Union, in 1985 the European legislator issued a Products Liability Directive²⁶⁶, in order to prevent consumers from suffering damage relating to defective products.

However, the European Union deals with the safety of products in a different way than the United States does.

In fact, in the European Union the safety of products is mostly left to public regulation and, whereas products liability litigation serves a supplementary preventive role, it has primarily a compensatory function in cases in which a defective product caused a damage. On the contrary, in the United States products liability law is the main regulatory tool to monitor and enhance product safety. This is also reflected by the imposition of punitive damages in this particular field of law²⁶⁷.

²⁶⁵ See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., p. 196, according to which « [...] claimants in the United States have more actual interest in a claim than claimants in Europe. [...] the products liability system is more extensively used in the United States, at least when compared to the European Union where products liability law was a “minority area of practice” in 2000. In the past years, this image has not changed drastically».

²⁶⁶ Council Directive 85/374/EEC of 25th July 1985. See S. DEAKIN-A. JOHNSTON-B. MARKESINIS, *Markesinis and Deakin's Tort Law*, cit., p. 703, according to which «the model of extended liability was borrowed largely from the law of the United States».

²⁶⁷ See G.G. HOWELLS, *The Relationship Between Product Liability and Product Safety – Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. position*, in *Washburn L.J.*, 2000, pp. 307-308, according to which «Products liability has, however, two (often conflicting) functions – compensating injured persons and acting as a gate-keeper and deterrent to ensure producers only market safe products. The role of punitive damages in the U.S. suggests

Furthermore, the difference between American and European product safety regulation is clearly demonstrated by the example of defective cars. In fact, in the United States, products liability law has a specific area of automotive litigation, whereas in the European Union, the safety of cars is mainly regulated through product safety law²⁶⁸. Thus, the United States developed a litigation strategy, whilst the European Union developed a regulation strategy toward the protection of health and safety in society.

In conclusion, the different perspectives in the United States and Europe, due to the existence of different policy choices, also explain why punitive damages are largely absent in continental European legal systems.

3. The Growing European Attention for Punitive Damages

Notwithstanding the critics raised, supporters of punitive damages have found signals in the European legislation and case-law showing that the European Union does not totally reject this particular civil remedy²⁶⁹.

that the regulatory function of litigation is important. Moreover, the threat of wide scale products liability litigation can be seen as an incentive for producers to improve the quality of their products, often with fiscal incentives from insurers. Although civil liability rules have a regulatory dimension in Europe, my impression is that products liability is more responsive to the compensatory needs of accident victims than to the regulatory aspects. Many Americans consider Europe to have a weak products liability litigation culture, but I gain the impression that there is sometimes a failure to appreciate the depth of the product safety regulatory regimes, which may explain why there is less need for products liability litigation as a means of regulatory control».

²⁶⁸ For example, Directive 96/79/EC and Directive 96/27/EC. See Directive 2001/95 EC on general product safety.

²⁶⁹ See G. WAGNER, *Neue Perspektiven im Schadenersatzrecht – Kommerzialisierung, Strafschadenersatz, Kollektivschaden, Gutachten für den 66. Deutschen Juristentag*, in *Verhandlungen des 66. Deutschen Juristentages Stuttgart 2006*, C.H. Beck, 2006, Vol. I, Part A, p. 69, according to which the position of the European Union regarding punitive damages is not only ambivalent, but also clearly self-contradictory. Moreover, see H. KOZIOL, *Punitive Damages – A European Perspective*, in *La L Rev.*, 2008, p. 749, stating that: «on the other hand, an inclination towards punitive damages exists in some directives; for example, on consumer credit and in the area of anti-discrimination

Thus, it is worth to analyze in which way the Court of Justice of the European Union (CJEU) deals with this issue and how the European legislator reacts.

3.1 The position of the European Union legislator

The drafting process of the Rome II Regulation²⁷⁰, even if it deals with private international law cases, clearly demonstrates the ambivalent attitude of the European Union towards punitive damages.

In the original draft²⁷¹, the Commission decided to combine a general rule on public policy (*ordre public*) with a more specific rule dealing with non-compensatory damages²⁷².

This was justified by alleged widespread concern raised during the consultation phase by many contributors, predominately Germany, who argued that the absence of provisions limiting liability would be problematic. In fact, they found the general *ordre public* exception insufficient to avoid excessive damages such as punitive damages²⁷³.

in the workplace, particularly with regard to discrimination between men and women. Furthermore, the European Court of Justice demands the effectiveness of sanctions imposed by national laws for the violation of obligations arising from Community law».

²⁷⁰ Regulation EC No. 864/2007 of the European Parliament and of the Council of 11th July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31.7.2007, 40-49.

²⁷¹ Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II), 22/07/2003, COM/2003/0427 final.

²⁷² The proposed article 24 reads as follows: «The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy».

²⁷³ See Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM/2003/0427 final, p. 29, in which it can be noted that the idea of applying the law of a third country providing for damages not intended to compensate worried many contributors to the written consultation. On the contrary, see C. VANLEENHOVE, *Punitive Damages and European Law: Quo Vademus?*, in L. MEURKENS-E. NORDIN (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, 2012, p. 335, according to which «the Commission however seemed to have forgotten how the legal systems of England and Ireland actually operate. The original draft would have

However, the Report on the proposal (also known as the Wallis report)²⁷⁴ recommended that the proposal be softened by rephrasing it to a mere option of the forum to refuse the application of a foreign law allowing for punitive damages²⁷⁵.

Subsequently, the Commission succumbed to this request and amended its proposal²⁷⁶ by deleting Article 24 and merging it with Article 23²⁷⁷.

Thus, instead of automatically ruling out punitive damages as violating public policy of the European Community, the new wording was meant to leave it purely optional for the national judge whether or not they deemed non-compensatory damages in violation of his own country's public policy²⁷⁸.

had illogical consequences for those Member States since an English court for instance would have had to refuse the application of a foreign law granting punitive damages and replace it by its own domestic law (*lex fori*) which awards such damages itself. [Moreover] Article 24 would also have caught other non-compensatory damages such as the account of profits which have an important function and are fundamentally different from punitive damages. This was caused by the lack of specificity as to the types of non-compensatory damages Article 24 aims to exclude».

²⁷⁴ Draft Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), 2003/0168 (COD).

²⁷⁵ See Draft Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), 2003/0168 (COD), pp. 31-33, in which rapporteur Diana Wallis, even if she felt sympathetic towards the proposed provision, thought it beyond the scope of the Regulation to introduce this new concept and to remove the possibility of awarding punitive damages as the Commission proposed in Article 24.

²⁷⁶ Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II), 21/02/2006, COD/2003/0168.

²⁷⁷ In Article 23 it was stated that: «The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum».

²⁷⁸ See F.X. LICARI, *Prendre les punitive damages au sérieux: propos critique sur un refus d'accorder l'exequatur à une décision californienne ayant alloué des dommages-intérêts punitifs*, in *JDI*, 2010, no. 17, according to which only excessive punitive damages are deemed to fall under the umbrella of the public policy exception.

However, this softened approach was subsequently smashed by the Council with its Common position²⁷⁹, arguing that it was «difficult for the time-being to lay down common criteria and reference instruments for the purposes of defining public policy»²⁸⁰.

As a consequence, in the final version of the Rome II Regulation only the first sentence of Article 23 of the proposal was retained in current Article 26, which deals with the public policy of the forum²⁸¹.

Nonetheless, a reminder of the discussion on punitive damages is recalled by the Regulation's preamble²⁸². Thus, retaining at least an indication in the preamble of some Community general attitude towards non-compensatory damages, despite its lack of legal force, is still a political signal²⁸³.

Despite the Rome II Regulation, the European Union's attitude towards punitive damages is clear and inconsistent in other legal acts too.

²⁷⁹ Common Position adopted by the Council on 25th September 2006 with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) (EC) No. 22/2006, 25.9.2006, *OJ C* 289/3, 28/11/2006, p. 68.

²⁸⁰ Statement of the Council's Reasons, 2003/0168 (COD), 25/09/2006, p. 11.

²⁸¹ Article 26 of the Rome II Regulation now states that: «The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum». See B.A. KOCH, *Punitive Damages in European Law*, in H. KOZIOL – V. WILCOX (eds.), *Punitive Damages: Common Law and Civil Law perspectives*, 2009, p. 199, stating that «this manœuvre did not change the interim version of the amended draft in substance, however, as each forum naturally retains the right to hold punitive damages in violation of its *ordre public* even without explicitly restating the obvious in the Regulation's text».

²⁸² Recital 32 of the preamble to the Rome II Regulation reads: «In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum».

²⁸³ See R. PLANDER-M. WILDERSPIN, *The European Private International Law of Obligations*, London, 2009, p. 752, according to which the inclusion of the Recital in the Regulation is meaningful because it enables the Court of Justice of the European Union to draw the line as to what amounts to an excessive non-compensatory award, thereby defining the boundaries of public policy.

On one hand, supporters of punitive damages see article 18 of Regulation No. 1768/1995²⁸⁴ as a proof of the existence of punitive damages within European law. In fact, under this provision, the rightholder is awarded a multiple of the actual loss incurred and such overcompensation seems to be punitive in nature²⁸⁵.

On the other hand, the 26th Recital of the Preamble to the Intellectual Property Rights (IPR) Enforcement Directive explicitly excludes punitive damages²⁸⁶.

²⁸⁴ See article 18 of Commission Regulation (EC) No. 1768/95 of 24th July 1995 implementing rules on the agricultural exemption provided for in article 14, par. 3, of Council Regulation (EC) No. 2100/94 on Community plant variety rights, *OJ L* 173, 25/07/1995, pp. 14-21, stating that:

«1. A person referred to in Article 17 may be sued by the holder to fulfil his obligations pursuant to Article 14(3) of the basic Regulation as specified in this Regulation.
2. If such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14(3) 4th indent of the basic Regulation, in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage pursuant to Article 94(2) of the basic Regulation shall cover at least *a lump sum calculated on the basis of the quadruple average amount charged for the licensed production* of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage».

²⁸⁵ See B.A. KOCH, *Punitive Damages in European Law*, cit., pp. 208-209, according to which « [...] such provision [...] whose scope of application is admittedly not extremely extensive, and more may follow if, say, the Commission's plans materialise to boost private law enforcement of antitrust rules by way of non-compensatory damages».

²⁸⁶ Directive 2004/48/EC of the European Parliament and of the Council of 29th April 2004 on the enforcement of intellectual property rights, *OJ L* 195, 2/06/2004, pp. 16-25. Recital 26 reads as follows: «With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses

Furthermore, article 340, Treaty on the Functioning of the European Union (TFEU), which deals with compensation claims against EU institutions, employs exclusively language aiming at compensation²⁸⁷. Thus, it appears that the European legislator considers punitive damages not available at all²⁸⁸.

3.2 The Case-Law of the Court of Justice of the European Union

incurred by the rightholder, such as the costs of identification and research». However, see the recent decision of the CJEU (*Stowarzyszenie 'Olawska Telewizja Kablowa' w Oławie v. Stowarzyszenie Filmowców Polskich w Warszawie*), commented *infra* §3.2, in which the Court clearly stated that the Directive does not prevent EU countries from providing for the award of punitive damages for IP infringement under their own national laws.

²⁸⁷ Article 340, TFEU, states that: «In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties». Moreover, see Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which seems to discard punitive damages, too. In particular, article 3, par. 3, states that: «Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages».

²⁸⁸ Another document in which the Commission has shown its opinion concerning punitive damages is the Green Paper on liability for defective products from 1999. The Commission makes clear in this paper that European products liability law is better off without punitive damages [COM (1999), 396 final, p. 13]. This is in conformity with the Directive of 1985 on liability for defective products, which is focused on compensation without even mentioning punitive damages (Directive 85/374/EEC). The Green Paper on consumer collective redress published in 2008 also makes clear that punitive damages are a remedy that might «burden business» or «encourage a litigation culture» and should therefore be avoided [COM (2008) 794 final, pp. 48 f.]. Then, the European Commission has again rejected the use of punitive damages in this context in a recent communication of 11 June 2013 concerning the future of a European Horizontal Framework for Collective Redress [COM (2013) 401/2], according to which collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punitive and deterrent functions should be exercised by public enforcement. Thus, since there is no need for EU initiatives on collective redress to go beyond the goal of compensation, punitive damages should not be part of a European collective redress system.

The Court of Justice of the European Union has played a central role in respect of the increased interest in punitive damages at European Union level.

In fact, supporters of punitive damages have brought forward the Court's approach with regard to the effectiveness of national sanctions that may be imposed for breaches of European Union law as a proof of the uncertain and inconsistent position of the European Union.

The right to damages for breaches of European Union law is an established right which goes hand-in-hand with the principle that national remedies must secure the effectiveness of European Union law. The principle of effectiveness (*effet utile*) has been interpreted by the ECJ as a requirement for national courts to give adequate effect to directly applicable EU rights in cases arising before them²⁸⁹.

In this respect, fundamental was the Greek Maize decision²⁹⁰, in which the European Court of Justice declared that national sanctions which may be imposed for breaches of European Union law should be «effective, proportionate and dissuasive». In fact, this formula has been reiterated

²⁸⁹ E.g. CJEU 10 April 1984, case 14/83, ECR 1891 (*Von Colson and Kamann v. Land Nordrhein-Westfalen*); CJEU 19 June 1990, case C-213/89, ECR I-2433 (*R. v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others*) (*Factortame I*); CJEU 8 November 1990, case C-177/88, ECR I-3941 (*Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*); CJEU 13 March 1991, case C-377/89, ECR I-1155 (*Cotter and McDermott v. Minister for Social Welfare and Attorney General*); CJEU 25 July 1991, case C-208/90, ECR I-4269 (*Emmott v. Minister for Social Welfare and the Attorney General*); CJEU 2 August 1993, case C-271/91, ECR I-4367 (*Marshall v. Southampton and South West Hampshire Area Health Authority*); CJEU 8 March 2001, joined cases C-397/98 and C-410/98, ECR I-1727 (*Metallgesellschaft and Hoechst v. Commissioners of Inland Revenue*); CJEU 20 September 2001, case C-453/99, ECR I-6297 (*Courage Ltd. v. Crehan*).

²⁹⁰ ECJ C-68/88, *Commission v. Hellenic Republic* [1989] ECR 2965. In this case, the Court relied upon art. 5 [now art. 10] ECT to delineate the measures Member States have to take in order to respond to infringements of Community law. The Court declared that «whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive».

in subsequent ECJ decisions and EU legislative acts and it has been connected to the punitive damages remedy²⁹¹.

²⁹¹ Most reoccurrences of this formula in EU legislation explicitly address “penalties” as in the Greek Maize case. E.g. art. 13 Directive 2006/24/EC of the European Parliament and of the Council of 15th March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *OJ L* 105, 13/04/2006, pp. 54-63; art. 46 Directive 2007/46/EC of the European Parliament and of the Council of 5th September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), *OJ L* 263, 9/10/2007, pp. 1-106; art. 30 Directive 2007/59/EC of the European Parliament and of the Council of 23rd October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, *OJ L* 315, 03/12/2007, pp. 51-78; art. 16 Council Directive 91/477/EEC on control of the acquisition and possessions of weapons as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21st May 2008, *OJ L* 179, 08/07/2008, pp. 5-11; art. 30 Directive 2008/50/EC of the European Parliament and of the Council of 21st May 2008 on ambient air quality and cleaner air for Europe, *OJ L* 152, 11/06/2008, pp. 1-44.

However, some provisions speak more broadly of “sanctions” without any further qualification. E.g. art. 16(a) of Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work, as amended by Directive 2003/18/EC of the European Parliament and of the Council of 27th March 2003, *OJ L* 097, 15/04/2003, pp. 48-52; art. 14 of Council Directive 1999/13/EC of 11th March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, *OJ L* 85, 29/03/1999, pp. 1-22; art. 20 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L* 178, 17/07/2000, pp. 1-16); art. 8 of Directive 2002/14/EC of the European Parliament and of the Council of 11th March 2002 establishing a general framework for informing and consulting employees in the European Community, *OJ L* 80, 23/03/2002, pp. 29-34; art. 11 of Council Directive 2002/65/EC of the European Parliament and of the Council of 23rd September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directive 97/7/EC and 98/27/EC, *OJ L* 271, 09/10/2002, pp. 16-24; art. 3 of Council Directive 2002/90/EC of 28th November 2002 defining the facilitation of unauthorized entry, transit and residence, *OJ L* 328, 05/12/2002, pp. 17-18; art. 17 of Directive 2004/25/EC of the European Parliament and of the Council of 21st April 2004 on takeover bids, *OJ L* 142, 30/04/2004, pp. 12-23.

Another important decision is *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen (Von Colson)*²⁹², concerning the correct interpretation of the Equal Treatment Directive²⁹³. In this case, both women applied for two positions at the all-male Werl prison in North Rhine Westphalia (Germany). Due to the problems and risks attached to female employees working in a prison populated by men, the recruiters decided to engage two men. The applicants felt they were unlawfully denied employment on grounds of their sex and asked for compensation in the German court. The latter referred several questions to the ECJ for a preliminary ruling, particularly as regard to article 6 of the Directive, which obliged Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves offended by a failure to apply to them the principle of equal treatment to pursue their claims by judicial proceeding. In this respect, the ECJ found the German transformation of the Directive to be inadequate²⁹⁴. In fact, even if Member States are free to choose the appropriate measures in order to remedy violations of article 6 of the Directive, higher damages than the costs of postage and other expenses have to be awarded in order to require liability to go beyond mere symbolic payment²⁹⁵.

²⁹² ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECR 1984, p. 1891. There is also a corresponding case of the same day: ECJ 10 April 1984, *Dorit Harz v. Deutsche Tradax GmbH*, ECR 1984, p. 1921.

²⁹³ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, L 039, 14/02/1976, p. 40.

²⁹⁴ ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECR 1984, p. 1891, par. 14, holding that: «The principle of the effective transposition of the directive requires that the sanctions must be of such nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on an expectation is not sufficient to ensure compliance with that principle».

²⁹⁵ ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECR 1984, p. 1891, par. 28, stating that: «If a Member State chooses to penalize breaches [...] by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than

Furthermore, of utmost importance is the principle established by the ECJ in the *Francovich* case²⁹⁶ and further developed in the joined cases *Brasserie du pêcheur* and *Factortame III*²⁹⁷, according to which a Member State may be held liable for damages under the principle of (Member State) liability for breach of European Union law. In particular, in the latter case, the Court referred to damages with a punitive function, by stating that «an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law»²⁹⁸.

purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application». See N. JANSEN-L. RADEMACHER, *Punitive Damages in Germany*, cit., pp. 84-85, according to which these damages for discrimination cannot be explained within the traditional compensatory framework, but conversely fit into the concept of punitive damages.

²⁹⁶ CJEU 19 November 1991, joined cases C-6/90 and C-9/90, ECR I-5357 (*Francovich and Bonifaci v. Italy*).

²⁹⁷ CJEU 5 March 1996, joined cases C-46/93 and C-48/93, ECR I-1029 [*Brasserie du pêcheur SA v. Germany* and *R. v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others* (Factortame III)].

²⁹⁸ Joined cases *Brasserie du pêcheur* and *Factortame III*, pp. 89-90, in which the ECJ stated that: «As regards in particular the award of exemplary damages, such damages are based under domestic law, as the Divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law. [...] Accordingly, the reply to the national courts must be that reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law».

As a consequence, many scholars have interpreted the principle of equivalence as requiring the award of punitive damages if such damages could in similar circumstances be awarded according to national law²⁹⁹. Finally, it is worth to mention the recent decision of the ECJ regarding the Intellectual Property Rights (IPR) Enforcement Directive³⁰⁰.

The case concerned the compatibility with article 13 of Directive 2004/48³⁰¹ of a provision of the Polish copyright law, according to which, in case of infringement, the copyright holder may be awarded a sum of money consisting of two or three times the amount of the hypothetical royalty. In this respect, the ECJ did not rule out that businesses that infringe the intellectual property rights of others can be ordered to pay damages that value multiple what it would have cost them to license the use of that IP legitimately³⁰². In fact, according to the

²⁹⁹ See K. OLIPHANT, *Cultures of Tort Law in Europe*, p. 244. Moreover, in the Manfredi case, the ECJ went one step further, establishing that this requirement does not only apply to Member State liability but also to actions by private parties for breaches of EU competition rules (see *infra* §4.2).

³⁰⁰ *Stowarzyszenie 'Oławska Telewizja Kablowa' w Oławie v. Stowarzyszenie Filmowców Polskich w Warszawie*, C-367/15, ECLI:EU:C:2017:36

³⁰¹ Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights reads as follow:

«1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or
b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established».

³⁰² The Court, in fact, ruled that: «Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as not precluding national legislation, such as that

Court, the Enforcement Directive «lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from laying down measures that are more protective». As a consequence, the Directive does not prevent EU countries from providing for the award of punitive damages for IP rights infringements under their own national laws³⁰³.

To conclude, it is clear that, despite the more restricted and negative approach of the European legislator, the CJEU seems to be more willing to welcome the punitive damages remedy into the European Union³⁰⁴.

4. European Competition Law

An important cause of the growing European interest in punitive damages is the concept of private enforcement, which finds its origins in the field of competition law.

at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used».

³⁰³ The Court, in fact, stated that: «[...] that interpretation [is not] called into question by the fact that Directive 2004/48, as is apparent from recital 26, does not have the aim of introducing an obligation to provide for punitive damages. [...] the fact that Directive 2004/48 does not entail an obligation on the Member States to provide for ‘punitive’ damages cannot be interpreted as a prohibition on introducing such a measure». Moreover, it is important to highlight that this decision appears to be in flagrant contrast with the opinion of Advocate General Sharpston. In fact, whereas he stated that «it cannot be said that the notion of punitive damages must be regarded as being irreconcilable in all circumstances with the requirements of EU law», an award of punitive damages does not satisfy the proportionality test, which requires a relationship between the loss suffered and the amount claimed. Thus, in his view, the Directive does not authorize a Member State to provide a rightholder whose intellectual property rights have been infringed with an entitlement to punitive damages.

³⁰⁴ See B.A. KOCH, *Punitive Damages in European Law*, cit., p. 205, according to which «the bottom line of this jurisprudence is therefore *not* that the ECJ wants to promote punitive damages [...] ».

In complete contrast to the United States, where private antitrust lawsuits are most prevalent, private damages actions in the European Union (EU) are not very common and have never played a central enforcement role. However, thanks to the Court of Justice of the European Union, the debate on private enforcement of competition law in Europe was opened, particularly with the *Courage v. Crehan* judgement³⁰⁵, in which the Court explicitly recognized a right to damages for breaches of EU competition law.

Supporters of punitive damages see this decision, as well as the following, as proof of a positive approach to and increased interest in punitive damages.

Therefore, it is worth to analyze those judgements, which had also the effect of pushing the European Commission to express a position as regard to the adoption of punitive damages in case of competition law infringements.

4.1 The Courage Case

The European Court of Justice has played an essential role in the initial shaping of private antitrust enforcement in the European Union.

Accordingly, fundamental was the *Courage v. Crehan* judgment³⁰⁶, which led to the establishment of the right of any individual to claim damages before national courts for loss caused by anticompetitive behaviors.

First of all, the Court made it clear that if claiming damages, arisen from a conduct which restricts or distorts competition, were not open to any individual, the full effectiveness of the Treaty, and, in particular, the

³⁰⁵ Judgement of the Court of Justice 20 September 2001, Case C-453/99, *Courage Ltd v. Bernard Crehan*, ECR 2001, I-6297.

³⁰⁶ In this case, Mr. Crehan, a leaseholder in two Intrapreneur pubs, was contracted to purchase most of his beer from the brewer Courage. The latter sued Crehan in the English High Court for unpaid debt. In his defense, Crehan challenged the lawfulness of the agreement, by claiming that it violated article 101, TFEU. He also launched a counterclaim for damages, arguing that the illegal agreement caused the failure of his business. The case reached the Court of Appeal, which in turn referred it to the ECJ, asking, *inter alia*, whether a co-contractor has a right to damages.

practical effect of the prohibition laid down in article 101, TFEU,³⁰⁷ would be at risk³⁰⁸. Moreover, the European Court of Justice acknowledged that the existence of such a right would have the effect of strengthening the role of EU competition provisions, as well as, of deterring the conclusion of agreements liable to restrict or distort competition³⁰⁹.

³⁰⁷ Article 101, TFEU, provides that:

«1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question».

³⁰⁸ See *Courage v. Crehan*, par. 25-26, which state that: «the full effectiveness of article 81 [now 101 TFEU] of the EC-Treaty and, in particular, the practical effect of the prohibition laid down in article 81(1) [now 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition».

³⁰⁹ See *Courage v. Crehan*, par. 27, stating that: «the existence of such a right strengthens the working of the Community competition rules and discourages – frequently covert – agreements or practices, which are liable to restrict or distort

In this respect, national courts play an important role in applying EU law provisions, since they should ensure that such rules take full effect and protect the rights they confer upon individuals³¹⁰. Thus, if effective European procedural rules are lacking, each Member State has to create an operative procedure enabling individuals to enforce competition law privately.

Furthermore, this decision is significant also because the claimant was not a victim of the anticompetitive behavior, but a party to the illegal cartel. In fact, there was a rule under English law according to which a party cannot obtain compensation from another party if they are both equally responsible for the damages. However, The Court's view was that the possibility of recovery of damages must in principle be open to any individual³¹¹.

Therefore, with the *Courage v. Crehan* case, the right to damages for EU competition law infringements has, for the first time, been established.

4.2 The Manfredi Case

The *Courage v. Crehan* judgment was later confirmed and elaborated on by the European Court of Justice in the *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni* decision³¹².

competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community».

³¹⁰ *Ibid.* par. 29: « [...] In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)».

³¹¹ *Ibid.* par. 28.

³¹² Judgement of the Court of 13 July 2006, C-295 to 298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni* 2006 [ECR], I-6619. The case concerned a damages action in the Italian courts regarding a price-fixing cartel agreement in the car insurance sector. Manfredi and other applicants claimed they had suffered economic damages and brought actions against their respective insurers in order to obtain compensation. A

First of all, the Court restated that the full effectiveness of article 101(1) required that «any individual can claim compensation for the harm suffered where there is a casual relationship between that harm and an agreement or practice prohibited under article 81 EC [now 101 TFEU] »³¹³.

In addition, the European Court of Justice was asked whether article 101, TFEU, requires national courts to award punitive damages.

In this respect, the Court affirmed that punitive damages should be available if they are also available for similar domestic claims³¹⁴. Thus, by saying so, the Court submitted that punitive damages are not contrary to the European public order³¹⁵.

Furthermore, it stated that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*), plus interest³¹⁶.

Therefore, the Manfredi judgement reiterates the need for an effective compensation of the victims for competition law infringements. And the

number of questions were referred to the Court for a preliminary ruling, particularly regarding the award of punitive damages.

³¹³ *Manfredi*, par. 60-61.

³¹⁴ *Manfredi*, par. 93: «In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law [...] ».

³¹⁵ However, as pointed out in one of the working documents that accompany the Commission White Paper on damages actions for breach of the EC antitrust rules, this acceptance of punitive damages shows that the Court is not concerned about unjust enrichment or a windfall for the plaintiff in case such damages are awarded: «The fact that the Court accepts the existence of punitive damages, which by definition implies a transfer of assets to the claimant beyond the damage actually suffered, shows that there is no absolute principle of Community law that prevents victims of a competition law infringement from being economically better off after a successful damages claim than the situation they would be in ‘but for’ the infringement. It can thus be assumed that an enrichment would no longer be unjust if it results directly from the application of the relevant substantive and procedural rules, meaning that it would be “justified” by law. In the absence of such rules, the Court seems to accept domestic rules that aim at prohibiting enrichment without a just cause».

³¹⁶ *Manfredi*, par. 91-95.

fact that the Court allowed Member States to adopt multiple damages can be seen as an attempt to enhance private enforcement³¹⁷.

4.3 The Commission's Initiatives

On the basis of *Courage v. Crehan* and *Manfredi* decisions, individuals now have a right to claim damages before national courts for the harm resulting from anticompetitive conducts. According to this, national courts must set criteria for determining an appropriate award of damages, which may include punitive damages if such remedy is available for competition law claims based on national law.

Thus, triggered by the case-law of the CJEU, the Commission focused on the enhancement of damages actions, in order to stimulate individuals who are harmed by anticompetitive behaviors to obtain justice, by asking for compliance of EU competition law before national courts.

4.3.1 The Ashurst Report

A first step was to identify the main obstacles hindering private enforcement, and to find possible solutions.

³¹⁷ See A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, in L. MEURKENS-E. NORDIN (eds.), *The Power of Punitive Damages – Is Europe Missing Out?*, Intersentia, 2012, p. 438, according to which «This [possibility] should, however, not lead to the conclusion that the Court considers punitive damages to be appropriate in all competition cases, or that they should be available in all jurisdictions. The adoption of multiple damages gives rise to numerous issues and should, therefore, be assessed in the light of the concrete circumstances and context of the case»; L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., p. 219, according to which «Contrary to the CJEU in *Manfredi* and the Commission in the White Paper working document, the legislator of the European Union did declare punitive damages as being contrary to public policy in recital 32 of the Preamble of Rome II. This is a clear example of the uncertain and self-contradictory position of the European Union with regard to punitive damages».

With this aim the Commission initiated a study, known as the Ashurst Report³¹⁸, which was published in August 2004.

However, the outcome was not very optimistic³¹⁹, since the report found that only three Member States³²⁰ had a specific legal basis for bringing damages actions based on national competition law. Thus, in the absence of a legal basis, the other Member States referred to general provisions for the conditions of liability³²¹.

Moreover, according to this study, throughout the European Union around 60 antitrust claims were reported in 2004. However, only 28 have resulted in a damages award³²².

Finally, the report also paid attention on punitive damages as a possible mechanism of private enforcement in competition cases. In fact, among the possibilities to increase the level of damages and encourage plaintiffs

³¹⁸ Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst Brussels, 2004).

³¹⁹ Ashurst Report 2004, p. 1: «The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment».

³²⁰ Finland, Lithuania, Sweden.

³²¹ See L. MEURKENS, *Punitive Damages: The Civil Remedy in American Law, Lessons and Caveats for Continental Europe*, cit., pp. 221-222, according to which «[...] the absence of a specific legal basis in most Member States does not in itself create obstacles, although the existence of a legal basis may 'raise the profile' and thereby encourage private persons to initiate proceedings». Moreover, see M.F.J. HAAK-I.W. VERLOREN VAN THEMAAT, *De Mogelijkheden voor Civielrechtelijke Handhaving van de Mededingingsregels in Nederland - Een Inventarisatie in Opdracht van het Ministerie van Economische Zaken*, Amsterdam: Houthoff Buruma, 2005, pp. 1-9, which gave three explanations for the lack of private enforcement of competition law: (1) the financial and other risks are outweighed by the expected benefits of the procedure; (2) it is very difficult for an injured party to produce proof of a competition law infringement; and (3) it is also difficult to produce proof as regards the injured party's loss, whereas it is quite easy for the infringer to put up defenses in this regard.

³²² See A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., pp. 442-443, according to which «In contrast with the situation prior to the Courage case, the uncertainty of the existence of a right to damages no longer seemed to be the main impediment. Potential claimants have mostly been discouraged by unfavorable elements of this remedy, a lack of clarity as to its application, and a general reluctance to make use of it».

to bring an action, the report mentioned the introduction of a form of punitive damages³²³.

4.3.2 The Green Paper

On the basis of the Ashurst Study, the Commission published a Green Paper³²⁴ and a Commission Staff Working Paper on antitrust damages actions in December 2005.

Their objective was to «identify the obstacles to a more efficient system for bringing such claims and propose options for solving these problems»³²⁵.

From this paper, it appears that the Commission was extremely concerned about the small number of victims that brought actions for damages for competition law infringements.

Thus, according to the Commission, the most important aims and advantages of a more developed private enforcement of EU competition law are two. First of all, victims of such infringements should be

³²³ Ashurst Report 2004, p. 12: «The availability of punitive, exemplary or treble damages would clearly increase a potential plaintiff's possible award and constitute an incentive to bring an action in the first place [...] ».

³²⁴ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, par. 1.1, COM (2005) 672 final (19 December 2005). In the EU, green papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties to participate in a consultation process and debate on the basis of the proposals they put forward. The proposals included in green papers and their subsequent discussion may give rise to legislative developments that are then outlined in White Papers.

³²⁵ Green Paper, par. 3. Moreover, see Commission's press release from 20 December 2005, according to which the measures proposed by the Green Paper would ensure that companies and consumers were compensated for their losses, while avoiding claims instituted without sufficient grounds and serving only to cause annoyance to the defendant.

compensated³²⁶. Secondly, private enforcement has an important deterrent function³²⁷.

Then, giving individuals a more active role in the enforcement of competition law will bring European citizens into closer and more direct contact with laws and policies made at European Union level³²⁸.

As regard to punitive damages, The Commission considered as an option to induce persons harmed by anticompetitive conducts to bring actions

³²⁶ Annex to Green Paper 2005, p. 6: «It is fundamental to the idea of private damages actions that the victim of a violation of the law is entitled to compensation for the loss suffered as a result of the violation in question. If competition law is to better reach consumers and undertakings and enhance their access to forms of legal action to protect their rights, it is desirable that victims of competition law violations are able to recover damages for loss suffered. Damages can be claimed both in actions between co-contractors, as well as in actions brought by third parties against infringers of the law».

³²⁷ Annex to Green Paper 2005, pp. 6-7: «Enhanced private enforcement will maximise the amount of enforcement as a means of enforcement additional to public enforcement. Increased levels of enforcement of the law will increase the incentives of companies to comply with the law, thus helping to ensure that markets remain open and competitive. Increased private enforcement will enlarge the range of infringements for which competition law will be enforced as well as the level of enforcement generally. This will arise in particular from litigation which is not brought on the back of decisions adopted by public authorities (“follow-on” actions). In relation to follow-on actions, facilitating private enforcement will add more frequently than before to the fines imposed by public competition authorities the possibility for the victim of the anticompetitive behaviour to recover his losses. Both damages awards and the imposition of fines contribute the maintenance of effective competition and deter anticompetitive behaviour».

Moreover, see A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., p. 449, according to which «[...] if deterrence is one of the Commission's objectives when encouraging damage claims, as it stated in the Green Paper, the concession of multiple damages will in effect contribute to achieve this objective and can be considered a logical, and eventually adequate, measure. Allowing individuals to recover multiple damages can compensate for low probabilities of detection of hard-core cartels, and at the same time act as a disincentive for firms that are considering taking part in such agreements. The approach taken by the Commission in the Green Paper clearly reflects this point of view».

³²⁸ Annex to Green Paper 2005, p. 7: «Bringing Community competition law closer to the citizen will encourage greater involvement in the enforcement of that law and thus a greater awareness of and engagement in competition law on the part of European citizens. It will help bring European citizens and undertakings into closer and more direct contact with laws and policies made at European Union level».

and cartel members to cease their wrongful behavior the award of double damages for horizontal cartels³²⁹.

Accordingly, when determining the way in which damages should be defined, the Green Paper expressly provides for the option of double damages³³⁰.

However, this option has been the most controversial one. In fact, the reactions to the Green Paper clearly demonstrated that the great majority supported the compensatory principle for the recovery of damages, which was completely opposed to any other proposal departing from it³³¹.

³²⁹ Annex to Green Paper 2005, p. 43: «In order to create a clear incentive for claimants to bring antitrust damages cases, it could be envisaged to award double damages in case of the most serious antitrust infringements, i.e. horizontal cartels». See A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., p. 450, stating that: «In effect, the fact that victims can only claim a compensating amount of damages is not very encouraging to sue, particularly if we take into account the high costs that private litigation commonly involves and its unpredictable character. In this context, punitive damages can act as an (economic) incentive: plaintiffs will obviously be more likely to bring damage claims when the potential awards are higher».

³³⁰ Green Paper 2005, Option 16: «Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court». Moreover, see Annex to Green Paper 2005, p. 36, stating that «It should be borne in mind that most Member States exclude exemplary or punitive damages as contrary to their public policy. For that very reason, those Member States may refuse to recognize and to enforce decisions providing for such damages. Despite this situation, one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim. Such an incentive would be most apparent were the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or, alternatively, leave it completely to the discretion of the national court».

³³¹ See the comment of the Competition Practice Group (CMS) to the Commission Green Paper 2005, p. 13: «[...] in rare cases there may be multiple jeopardy for the infringer through parallel antitrust damages claims of direct and indirect purchasers. Multiple jeopardy is, from our point of view, a very small risk which the infringer should have to bear. This is also an argument against double and other exemplary damages».

4.3.3 The White Paper

The next step was taken in April 2008, when the Commission adopted the White Paper³³² on private damages actions for breach of the EC Antitrust Rules³³³, along with a Staff Working Paper³³⁴ and an Impact Assessment³³⁵.

In the light of the reactions to the Green Paper, the White Paper adopted many proposals, aiming to ensure that any victim of anticompetitive behavior can have access to appropriate enforcement mechanisms and be effectively compensated.

However, compared to the Green Paper, the Commission took a more reserved position³³⁶ and deliberations on punitive damages did not continue.

In fact, even if the Commission paid attention to the CJEU's ruling in *Manfredi*, according to which it should be possible to award punitive damages for competition law infringements if such damages may be awarded pursuant to similar actions based on national law, in the Impact Assessment the Commission made clear that in some Member States

³³² A Commission White Paper is a document containing policy proposals for EU actions in a specific area. As it does in this case, it often follows a Green Paper published to launch a consultation process on EU level. A White Paper does not have any binding effect, but it can lead to an action program for the EU in the area concerned, if it is favorably received.

³³³ White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final.

³³⁴ Commission staff working paper accompanying the White Paper on damages actions for breaches of the EC antitrust rules, SEC (2008) 404 final.

³³⁵ Commission staff working paper accompanying the White Paper on damages actions for breaches of the EC antitrust rules – Impact assessment, SEC (2008) 405 final. The White Paper should be read in conjunction with the aforementioned documents, the former offering a relevant overview of the existing *acquis communautaire*, and the latter analyzing the benefits and costs of the various policy options.

³³⁶ A. EZRACHI, *From Courage v. Crehan to the White Paper – The changing landscape of European private enforcement and the possible implications for Article 82 litigation*, in M.O. MACKENRODT-B. CONDE GALLEGOS-S. ENCHELMAIER (eds.), *Art. 82 EC: New Interpretation, New Enforcement Mechanisms?*, Dordrecht: Springer, 2008, p. 125, according to which the measures proposed in the White Paper were more conservative and disappointing.

legal objections exists. Moreover, the *Manfredi* judgement must be interpreted as meaning that it does not suggest that punitive damages should be introduced³³⁷.

Consequently, the Commission focused on full compensations of victims of competition law infringements³³⁸. Measures should be effective, but damages to be awarded should not influence the level of fines (public enforcement) or the result of any private actions taken³³⁹.

However, it should be kept in mind that, even if the Commission ultimately decided to avoid the use of a form of punitive damages in

³³⁷ Annex to White Paper 2008: Impact Assessment, pp. 27-28: «Another possibility considered was to discard from the outset, for reasons of legal compatibility, inclusion of multiple damages in any of the Policy Options. Multiple (punitive) damages (as opposed to purely compensatory damages) raise serious issues as regards their compatibility with the public policy and/or basic principles of tort law in many Member States. Under Community law, the existence of exemplary or punitive damages in Member States may be acceptable as the Court clarified in its *Manfredi* judgment that “in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law” (however, this does not imply that such particular damages should be introduced in every Member State). Therefore, with a view to subjecting the full spectrum of possible (and sometimes supported) solutions to an impact assessment, it was decided not to discard *a priori* double damages from the Policy Options, without ignoring that in some Member States there are legal objections to punitive damages. Particular attention was therefore paid to assessing the feasibility under national law and the impact of such measures [...] ».

³³⁸ White Paper 2008, p. 3: «Full compensation is, therefore, the first and foremost guiding principle [...] The policy choices proposed in this White Paper therefore consist of balanced measures that are rooted in European legal culture and traditions».

³³⁹ Annex to White Paper 2008: Impact Assessment, par. 61: «Since the primary objective pursued is full compensation of victims, the damages to be awarded should not influence the level of fines imposed by competition authorities in their public enforcement activities, nor under any future framework of enhanced private actions. Public fines and purely compensatory damages serve two distinct objectives that are complementary: the main objective of public fines (and of potential criminal sanctions) is to deter not only the undertakings concerned (specific deterrence) but also other undertakings (general deterrence) from engaging or persisting in behaviour contrary to Articles 81 and 82. The main objective of private damages is to foster corrective justice by repairing harm caused to individuals or businesses. Of course, as mentioned earlier, this by no means precludes that effective systems for provision of damages also have positive side-effects on deterrence».

order to achieve the effective enforcement of competition law as to ensure full compensation of victims, it did not reject *a priori* any possible introduction of punitive damages.

In fact, the Commission underlined that the appropriateness of the current definition of damages might be reconsidered, particularly if the situation in Europe does not change over the coming years³⁴⁰.

4.4 Did the Commission Make the Right Choice?

This *iter* shows that the European Commission has openly discussed the possible introduction of punitive damages as a private enforcement instrument in order to fight breaches of EU competition law.

³⁴⁰ Annex to White Paper 2008, par. 203-204: «The *acquis communautaire* on the definition of damages should be codified as a minimum standard. That being said, one also has to take into account the fact that the risk/reward balance in antitrust damages litigation is skewed against bringing actions. The Commission considers it necessary to address this negative balance by ensuring that there are sufficient incentives for victims of competition law infringements to bring meritorious claims. One way of doing so would be to assure the claimant *a priori* that if he wins the case, he will be awarded damages that are higher than the loss actually suffered. However, as mentioned in paragraph 194, such a general approach would not appear necessary today. If it were to emerge, though, that the current situation in Europe of very limited repair of the harm caused by infringements of the competition rules does not structurally change over the coming years, it should be considered what further incentives are required to ensure that victims of competition law infringements actually bring their antitrust damages action. In that context the appropriateness of the current definition of damages might have to be reconsidered».

Moreover, see A. ORTEGA GONZÁLEZ, *Punitive damages for cartel infringements: why didn't the Commission grasp the opportunity?*, cit., pp. 448-450, according to which «the suitability of the adoption of punitive damages will also depend on the role it plays in achieving the Commission's goals. [Thus] If by facilitating private damages actions, the Commission only aims at assuring full compensation of loss, the introduction of multiple damages awards would inevitably be excessive. It is certain that punitive damages do have compensatory benefits. The problem is that since this remedy affords by definition a higher award than the value of the loss suffered, the victims are *overcompensated*. The additional award incorporated in the “punitive element” of the remedy, would at the same time result in a “not pursued” deterrent effect. Full compensation can in all cases be effectively achieved by just awarding single damages, which are more adequate, as long as the final award for the victims is properly aligned with the size of the harm actually suffered».

Cartels have always been the main enforcement priority of the Commission and this is the reason why it proposed the introduction of punitive damages in the Green Paper, aiming not only to provide a remedy for victims, but also to combat them, by considerably increasing deterrence.

However, probably aware of the fact that the primary aim of damages actions should be compensation, because this is significantly what distinguishes private from public enforcement, the Commission removed this option in the White Paper.

The decision of the European Commission was right, because it demonstrated that its will was respectful for European legal traditions and, more specifically, for the individual legal systems.

Nonetheless, if the Commission had the opportunity to take such decision nowadays, the outcome would have probably been different, due to the recent development and changes of the punitive damages debate in certain European civil law countries.

Therefore, the time was not right yet.

CONCLUSIONS

TABLE OF CONTENTS: 1. Overview. – 2. Are common law and civil law systems diametrically opposed? – 3. Punishment is not an alien function of tort law. – 4. The need to supplement criminal law with private law. – 5. Does the punitive damages remedy have a future in the European Union?

1. Overview

Punitive damages are definitely one of the topics that divide common law and continental European civil law countries juridical culture.

As highlighted in Chapter II, even if there is no uniform practice among the major common law countries (England and the United States), what is undoubtedly is that punitive damages were born and are still part of common law jurisdictions, whilst they are considered to be alien to European civil law countries.

Nevertheless, notwithstanding this restrictive approach, many European scholars are inclined to endorse and even support the recognition of punitive damages.

Therefore, in recent times, growing attention is paid to this particular civil remedy, both at national and European level, and some reforms occurred in certain European civil countries. For these reasons my research aimed to answer to the question on whether punitive damages should be able to freely penetrate the borders of European legal systems or whether the American and English examples should deter them from following suit.

2. Are common law and civil law systems diametrically opposed?

If we consider together the American *BMW v. Gore* case, in which \$ 4 million as punitive damages were initially awarded to the plaintiff, and the Italian Supreme Court's decision no. 1183 of 2007, in which the court denied the enforcement of an American decision awarding punitive damages, due to their incompatibility with the Italian public order, we

would have the impression that the common law and continental European law are totally opposed.

However, if we carry out a deeper analysis, we would find out that this is true only to some extent.

First of all, as explained in Chapter II, common law countries differ from each other. In fact, even if the history of punitive damages is traced back to England, they developed in the United States independently from it. Accordingly, in England punitive damages are considered as an «anomaly»³⁴¹ and can be awarded only in three specific circumstances³⁴². Instead, in the United States, even if subject to the principle of proportionality, punitive damages are used as a generalized remedy at the disposal of the society.

Moreover, there is not uniform attitude even within the United Kingdom and the USA. In fact, for example, such damages are not awardable in Scotland, and, in the United States, three jurisdictions prohibit their recovery³⁴³ and two of them allow punitive damages in the narrow context of statutorily authorized situations³⁴⁴.

Then, as regard to European legal systems, despite the fundamental rejection of punitive damages (mainly derived by the exclusive compensatory function of tort law), some Member States have shown a different approach.

In particular, Italy, thanks to the recent decision of the *Corte di Cassazione*³⁴⁵, does not consider punitive damages incompatible with the Italian juridical system anymore, in so far as they do not contrast with the fundamental principles derived from the Constitution. Moreover, in France, new proposals aiming to reform and codify present tort law, by introducing a provision concerning punitive damages, have been registered³⁴⁶.

³⁴¹ As stated by Lord Devlin in *Rookes v. Barnard*.

³⁴² The category test elaborated in *Rookes v. Barnard*: (1) oppressive, arbitrary, or unconstitutional actions by servants of the government; (2) conduct calculated by the defendant to make a profit for himself that may well exceed the compensation payable to the plaintiff; and (3) actions where punitive damages are authorized by statute.

³⁴³ Washington, Louisiana and Massachusetts.

³⁴⁴ Louisiana and Massachusetts.

³⁴⁵ *Corte di Cassazione* 5 July 2017, no. 16601.

³⁴⁶ *Béteille Proposal* of 2010 and *Terré Tort Draft* of 2011.

So, it is true that the common law and civil law have many differences, also because the punitive damages remedy is accepted in common law countries, whilst in the European Union only Poland explicitly provides for them.

However, objections such as their excessiveness or the fact that the punitive function should have been only a prerogative of criminal law have been raised both by civil law and common law jurisdictions.

Therefore, for all those reasons, the attitude of common law and civil law systems towards punitive damages is not absolutely incompatible.

3. Punishment is not an alien function of tort law

The main objection that has been raised by European legal systems against punitive damages is that this Anglo-Saxon remedy is not compatible with the exclusive compensatory function of tort law. Thus, the recognition of punitive damages would be in contrast with the member states' public order, since the aims of punishment and deterrence, proper of the punitive damages remedy, would be alien to this system.

This assertion is not completely true. In particular, it is not in line with the current debate and developments occurred in many Member States, and with the principles of tort law established at European level.

First of all, one should not forget that Italy, despite a long and strong rejection of the polifunctional nature of tort law, has finally established, following the approach of dominant legal scholars, that tort law does not pursue exclusively a compensatory function, but punishment and deterrence are internal to this system.

Then, France does not even consider punitive damages *per se* contrary to the *ordre public*, because the only concern is the likely excessiveness of the civil remedy³⁴⁷.

Moreover, in Germany a deterrent/punitive function of tort law occurs beneath the surface. Accordingly, there are areas, such as intellectual property and unfair trade practice cases, and the awards of damages for pain and suffering, governed by the notion of deterrence. In fact, the

³⁴⁷ And the same is true also for Spain.

amount of damages has to be determined in such a way that the commission of similar torts would be deterred. Thus, the result is the award of damages that are not purely compensatory.

Finally, at European level, the PETL and DCFR show that tort law pursues also other functions, such as the prevention of the harm.

As regard to the punitive aim, their commentaries clearly state that punishment is not a function of tort law, but belongs to criminal law.

However, these two initiatives, besides the fact that are not binding, are outdated and not suitable to signal the new developments occurred in the Member States. Nonetheless, they are another proof of the polifunctional nature of tort law.

Therefore, it is incorrect to state that tort law has only one function. In fact, although one function may be less apparent than the other, tort law pursues several functions, also the punitive one³⁴⁸, and none of them is able alone to explain the complex system of tort law.

Thus, whereas it is generally accepted that compensation is the primary function of tort law, it is not the exclusive one. Moreover, the polifunctional nature of tort law is worthwhile, because it realizes an effective legal protection in the best way possible. In fact, there are situations in which tort law is not able to provide sufficient protection for legally accepted interests and to develop the necessary deterrent effect³⁴⁹.

Consequently, the monofunctional nature of tort law is an objection against punitive damages that cannot hold anymore.

4. The need to supplement criminal law with private law

Another argument that has been brought forward against punitive damages is that, due to the existence in European civil law systems of a firm separation between private law and criminal law, punitive damages cannot be awarded, because it would be improper to punish a wrongdoer without the appropriate procedural safeguards.

³⁴⁸ Also because, within tort law, the legal consequences of an act are attached to a violation of a duty and faulty behavior.

³⁴⁹ For example, non-pecuniary rights.

In fact, due to their punitory aim, many legal scholars believe that punitive damages are substantially a criminal sanction and, thus, should be awarded solely by the criminal judge.

However, the existence of the abovementioned separation does not mean that only criminal remedies should carry out punitive and deterrent functions. Therefore, the presence of a civil remedy which has also a punitive aim does not automatically imply that it has to be regarded as a criminal sanction.

Moreover, the issue of criminal procedural safeguards should not prevent the introduction of punitive damages, but should suggest the introduction of more intensified safeguards in the civil proceeding.

For instance, it can be proposed to adopt a higher burden of proof aiming to guarantee a sufficient degree of procedural fairness to the defendant.

Furthermore, it should be born in mind that punitive damages are civil sanctions, with the consequence that the procedural safeguards typically characterizing criminal proceedings may be deemed to be unnecessary when it comes to civil, even punitive, sanctions.

However, due to the punitive and deterrent goals, the principle of legality raises an issue that must be addressed before adopting punitive damages or any other form of civil punitive sanctions. In fact, if anyone had the power to inflict sanctions, as a consequence of a suffered tort, the principle of legality would be infringed.

Thus, it is an insuperable barrier, which stands as a limit against private individuals' contractual autonomy and against the judge, when exercising judicial powers.

Therefore, it is necessary a legislative intervention that clarifies which behavior corresponds to a sanction and what is the maximum amount of such sanction.

Nevertheless, notwithstanding those issues, the introduction of punitive damages, as a civil remedy, would bring several benefits. In particular, they would give relief to an overloaded criminal justice system by decriminalizing certain kind of wrongs. Their application would very likely improve deterrence in specific circumstances, such as when the gain of the defendant exceeds the plaintiff's losses. Furthermore, they would send the society a message that committing torts is morally wrong and call for the issuance of afflictive measures, especially when the

wrongdoer takes advantage of its economic power to the detriment of weak parties.

Thus, punitive damages could be used in order to solve societal problems relating to inadequate protection provided by criminal law mechanisms, particularly when there is a conduct that is reprehensible enough to trigger some sort of reaction but not reprehensible enough to trigger the reaction of the criminal law.

Criminal law is limited in its sphere of activity and needs supplementation by private law.

5. Does the punitive damages remedy have a future in the European Union?

The continuous evolution of the legal reality and of the needs of individual protection, and the increasing internationalization of juridical and social relations have rendered the common law and civil law systems much more intertwined.

Moreover, despite the original rejection, the recent developments occurred in certain EU Member States and in the case-law of the CJEU have demonstrated a much more open attitude towards the use of Anglo-Saxon mechanisms in order to satisfy the needs of punishment and deterrence.

However, punitive damages cannot be introduced in the European Union without giving fair consideration to the European legal traditions. In this respect, it is of utmost importance that punitive damages do not contrast with the fundamental principles established at European level, such as the principle of proportionality and legality. And such compliance has to be verified on a case-by-case basis.

Therefore, punitive damages should not be *per se* refused, but the foreseeability is an element that cannot be abolished. Individuals must know which conduct is able to give rise to sanctions and their *quantum*, as well.

In this respect, the fact that now punitive damages receive a certain regulation also in common law systems, because in England they can be awarded only in three specific circumstance and in the United States the Supreme Court has stated that due process rights require that safeguards

be in place in order to ensure fairness in the awarding of punitive damages and prohibit grossly excessive awards of punitive damages, renders more suitable a possible introduction of punitive damages in the European Union.

Therefore, it is not necessary and, maybe, appropriate to import punitive damages in the way they are.

Nevertheless, the European Union could benefit from the Anglo-Saxon experience and adapt the punitive damages remedy to the European values, particularly with regard to the principle of legality and the principle of proportionality.

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